SUBMITTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 209

THE STATE OF MISSOURI AT THE RELATION OF LEON HURWITZ, PLAINTIFF IN ERROR,

vs.

EMMETT P. NORTH, FRANKLIN E. MURPHY, CORTEZ F. ENLOW, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

FILED NOVEMBER 30, 1925

(30,702)

J43931

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 30, 1925

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[fol. 1] [Caption omitted]

[fol. 2] **IN CIRCUIT COURT OF JASPAR COUNTY, MO., APRIL TERM, 1923, AT JOPLIN**

19861

STATE OF MISSOURI at the Relation of LEON HURWITZ, Plff.,

vs.

EMMETT T. NORTH, FRANKLIN E. MURPHY, CORTEZ F. ENLOE, E. E. BRUNER, T. A. SON, T. H. WILCOXEN, and R. S. VITT, Respondents

JUDGMENT—May 19, 1923

Now at this day this cause comes on for hearing on the record and proceedings of the Missouri State Board of Health in revoking the license of the relator to practice medicine and surgery for a term of fifteen years. The relator appears by Owen & Davis, his attorneys and the respondents appear by J. Henry Caruthers, Roy Coyne and Ray Bond, their attorneys and by consent said matter is taken up and after hearing and reading the said record and proceedings and hearing the arguments of counsel and being fully advised in the premises the Court finds that the finding, judgment and proceedings of said Missouri State Board of Health should be sustained.

It is therefore ordered, adjudged and decreed by the Court that the judgment of the Missouri State Board of Health revoking the license of the relator herein to practice medicine and surgery for a term of fifteen years, and the record and proceedings had before said State Board of Health be and the same are in all things sustained, and that the costs of this cause be taxed to and recovered of and from the relator and that execution issue therefor.

[fol. 3] IN CIRCUIT COURT OF JASPER COUNTY

[Title omitted]

ORDER ALLOWING APPEAL—May 19, 1923

Now comes the relator and files his affidavit for an appeal and the same being by the Court examined and deemed sufficient, an appeal in this cause is granted to the Supreme Court of this State.

IN CIRCUIT COURT OF JASPER COUNTY

CLERK'S CERTIFICATE

I, A. E. Taggart, Clerk of the Circuit Court within and for the County of Jasper in the State of Missouri hereby certify that the

above and foregoing is a full, true and complete copy of the finding and judgment of said Court and the order granting an appeal in the above entitled cause as fully as the same remains of record in my office.

Witness my hand as Clerk and the seal of said Court. Done at my office in the City of Joplin, this 23rd day of May, 1923.

A. E. Taggart, Clerk, by Guy Webb, D. C. (Seal.)

[fol. 4] In Supreme Court of Missouri, —— Term

State of Missouri at the Relation of Leon Hurwitz, Relator,

vs.

Emmett P. North, Franklin E. Murphy, Cortez F. Enlow, E. E. Bruner, T. A. Son and R. S. Vitt, Respondents

Appellant's Abstract of Record—Filed March 6, 1924

On April 9th, 1923, relator filed in Division No. I, of the Circuit Court of Jasper County, Missouri, and in open court, the following petition:

In the Circuit Court of Jasper County, Missouri, at Joplin, Division No. One

The State of Missouri at the Relation of Leon Hurwitz, Plaintiff,

vs.

Emmett P. North, Franklin E. Murphy, Cortez F. Enlow, E. E. Bruner, T. A. Son, T. H. Wilcoxen, and R. S. Vitt, Respondents

Petition for Writ of Certiorari

Relator states that Emmett P. North, Franklin E. Murphy, Cortez F. Enlow, E. E. Bruner, T. A. Son, T. H. Wilcoxen and R. S. Vitt, [fol. 5] do now and did at all of the times herein mentioned, compose the Missouri State Board of Health.

That, on the 13th day of March, 1923, Roy Coyne, prosecuting attorney of Jasper County, Missouri, filed with the secretary of said State Board of Health, Cortez F. Enlow, a complaint seeking to have the license issued to Leon Hurwitz to practice medicine and surgery in this state revoked, which said complaint is, as follows:

"Complaint"

"To the State Board of Health:

Comes now the undersigned, Roy Coyne, prosecuting attorney within and for the County of Jasper and State of Missouri, and alleges and charges that one Leon Hurwitz is and was at all times

hereinafter mentioned a duly licensed physician and surgeon of the State of Missouri; that said Leon Hurwitz is now practicing such profession in the City of Joplin and vicinity in Jasper County, Missouri; that the said Leon Hurwitz has been and is guilty of unprofessional and dishonorable conduct, in this, to-wit, that he, the said Leon Hurwitz, on or about the 1st day of May, 1922, in the City of Joplin, State of Missouri, unlawfully produced a criminal abortion upon one Almeda Stewart, a pregnant woman, he, the said Leon Hurwitz, being then and there as aforesaid a licensed physician and then and there not intending necessary medical or surgical treatment, and not being then and there engaged in an act necessary to preserve the life of the said Almeda Stewart, or that of an unborn child; and not then and there intending any injury [fol. 6] other than the destruction of the pregnancy. Wherefore your complainant prays that an inquiry be had into the matters and things herein alleged and that the license to practice medicine and surgery in the State of Missouri, heretofore granted to the said Leon Hurwitz be by this Honorable Board revoked.

Roy Coyne, Prosecuting Attorney of Jasper County, Missouri.

Which said complaint was duly verified by the affidavit of said Coyne.

That, upon the filing of said complaint said State Board of Health by and through its Secretary issued and caused to be served upon relator a citation citing him to be and appear before said State Board of Health on the 6th day of April, 1923, at the Connor Hotel, in the City of Joplin, Jasper County, Missouri, and show cause upon a hearing to be had, why his said license should not be revoked.

That on said 6th day of April, 1923, said State Board of Health upon a hearing had upon said charge, revoked the license of relator to practice medicine and surgery for a period of fifteen years.

Relator charges that said State Board of Health was without jurisdiction to try relator upon said charge, for the following reasons, to-wit:

(1)

Because said Roy Coyne had no authority of law to file said complaint.

[fol. 7]

(2)

Because Section 7336, R. S. 1919, under which said proceedings had before said State Board of Health is null and void, for the following reasons, to-wit:

(a) Because said section does not authorize or empower said Board to issue subpœnas or other process for witnesses, and for the production of books, papers and documents to be used in evidence in the trial of such proceedings, and necessary for the defense in such proceedings.

(b) Because said section is in conflict with Section 30 of Article 2 of the Constitution of Missouri, and with the 14th Amendment to the Constitution of the United States, in that said Section 7336, R. S. 1919, authorizes and empowers said State Board of Health to revoke licenses issued to practice medicine and surgery in this state without due process of law, in that no compulsory process of law is afforded to compel the attendance of witnesses to be used upon a trial of such proceedings, and for the production of books, papers and documents to be used in evidence upon a trial of such proceedings.

That the revoking of the license of relator to practice medicine and surgery in this state was revoked without due process of law, in that relator was not afforded a trial of said complaint in a court of justice, organized and existing and operating according to rules of procedure, evidence and of law, and in that relator was by said State Board refused the necessary process to force the attendance of certain witnesses who were competent witnesses on the trial of said complaint and whose testimony was material to the defense of [fol. 8] relator against said charge or complaint of said Roy Coyne, and in that said State Board refused the necessary compulsory process to bring before said Board a certain prescription necessary to the defense of relator.

That said Board in the trial of said complaint committed many errors against relator in the admission of incompetent, irrelevant and immaterial evidence which influenced them to a decision revoking relator's license.

That the verdict and judgment of said State Board revoking the license is wholly unsupported by the evidence and is against the law applicable to the record made in said case; all of which errors are and will be disclosed by the record in said cause.

Wherefore plaintiff prays this court to issue a writ of certiorari requiring them and each of them to certify to this court a true, full and complete copy of the complaint filed by said Roy Coyne, and all other acts and proceedings in said matter, and have said copy returned to this court on or before the — day of April, 1923, in order that this court may adjudicate upon the legality of said proceedings, and may make such other and further adjudications and orders therein as right and justice may require.

Owen & Davis, Attorneys for Relator.

Sworn to by Leon Hurwitz. Jurat omitted in printing.

[fol. 9] ORDER ALLOWING WRIT OF CERTIORARI

Upon the filing of said petition, an order of court was made, directing the clerk of said court to issue writ of certiorari herein, commanding respondents to certify to said circuit court on April 23rd, 1923, the petition or complaint of Roy Coyne, prosecuting attorney, to have revoked the license of Leon Hurwitz, relator herein, to prac-

tice medicine and surgery in the State of Missouri, with all of the proceedings pertaining to the same, including a complete transcript of the evidence taken at the hearing had in the matter of said complaint, which said writ was in due form of law.

Said writ was in due time served upon each of respondents, and thereafter, on April 23rd, 1923, respondents made and filed in court the following return:

Return to Writ of Certiorari

Comes now the State Board of Health of the State of Missouri, and for return to the writ of certiorari issuing out of Your Honorable Court in the above entitled cause, tenders to the court a true and correct copy of the record of all proceedings had and testimony taken by said Board in the matter of the revocation of the license of Leon Hurwitz to practice medicine and surgery in the State of Missouri, as follows, to-wit: ——.

[fol. 10] In witness whereof I have hereunto set my hand and affixed the seal of the State Board of Health of Missouri, this 23rd day of April, 1923.

Cortez F. Enlow, Secretary of State Board of Health of Missouri.

Attached to said return and forming a part thereof was the record of the proceedings of the Missouri State Board of Health in the matter of the revocation of the license of Leon Hurwitz to practice medicine and surgery in the State of Missouri, which record is, as follows:

"Minutes of State Board of Health"

"A meeting of the Board was held in Jefferson City, on March 29th, 1923, and the following members were present: Dr. North, Dr. Vitt, Dr. Enlow, Dr. Son, Dr. Brunner, Dr. Wilcoxen.

The meeting was called to order by the President, Dr. Emmett P. North, and the minutes of the meeting of February 26 to March 1, 1923, were read and approved. (Among other things the following proceedings were had:) The committee desires to report that the papers in the matter of the revocation of the license in the Leon Hurwitz case have been prepared and the Secretary was directed by the Committee to re-set the date of the hearing in this matter to Friday, the 6th day of April, 1923, at the Connor Hotel, Joplin, Missouri, which was done accordingly, and the original papers are now on file in the office of the State Board of Health at Jefferson City, [fol. 11] Missouri."

Complaint

To the State Board of Health:

Comes now the undersigned, Roy Coyne, Prosecuting Attorney within and for the County of Jasper and State of Missouri, and

alleges and charges that one Leon Hurwitz is and was at all times hereinafter mentioned a duly licensed physician and surgeon of the State of Missouri; that said Leon Hurwitz, is now practicing such profession in the City of Joplin and vicinity in Jasper County, Missouri; that the said Leon Hurwitz has been and is guilty of unprofessional and dishonorable conduct, in this, to-wit: that he, the said Leon Hurwitz, on or about the 1st day of May, 1922, in the City of Joplin, State of Missouri, unlawfully produced a criminal abortion upon one Almeda Stewart, a pregnant woman, he, the said Leon Hurwitz, being then and there as aforesaid a licensed physician and then and there not intending necessary medical or surgical treatment; and not being then and there engaged in an act necessary to preserve the life of said Almeda Stewart, or that of an unborn child; and not then and there intending any injury other than the destruction of the pregnancy.

Wherefore, your complainant prays that inquiry be had into the matters and things herein alleged and that the license to practice medicine and surgery in the State of Missouri, heretofore granted [fol. 12] to the said Leon Hurwitz, be by this Honorable Board revoked.

Roy Coyne, Prosecuting Attorney of Jasper County, Missouri.

STATE OF MISSOURI,
County of Jasper, ss:

Roy Coyne, Prosecuting Attorney as aforesaid, the complainant herein, first being duly sworn, upon his oath, deposes and says that he has read the above complaint and that the statements therein contained are true according to his best information and belief.

Roy Coyne.

Subscribed and sworn to before me this 9th day of March, 1923. A. E. Taggart, Circuit Clerk. A. Taggart, D. C.

Notice

To Leon Hurwitz, Joplin, Missouri:

Notice is hereby given that on Friday, the 6th day of April, 1923, at the hour of ten o'clock in the forenoon, at the Connor Hotel in the City of Joplin, State of Missouri, before the Missouri State Board of Health, there will be held a hearing on the complaint that has been preferred against you, a copy of which complaint is hereto attached, wherein you are charged with unprofessional and dishonorable conduct, and it is thereby sought to revoke the license heretofore granted you by the Missouri State Board of Health authorizing you to practice medicine and surgery in the State of Missouri.

[fol. 13] You are further notified that you may appear, either in person or by counsel, or both, at the time and place above designated and will then and there be accorded an opportunity to present such matters and things in your behalf and defense as you may deem proper in the premises.

Done this 13 day of March, 1923, at Jefferson City, Missouri. Missouri State Board of Health, by Cortez F. Enlow, Secretary. (Seal.)

Attached to said notice was the return of the Sheriff of Jasper County, Missouri, showing service upon relator on March 14th, 1923.

"Proceedings of the Meeting of the State Board of Health"

"A meeting of the State Board of Health was held in Joplin, on April 6, 1923, with the following members present: R. S. Vitt, T. A. Son, T. H. Wilcoxen, Cortez F. Enlow and E. P. North; absent E. E. Bruner.

The meeting was called to order by Dr. North, chairman, and on roll call the above members responded.

Dr. Vitt: I move that we dispense with the reading of the minutes of March 29th; that they be approved, and we proceed with our regular business. This motion duly seconded and carried.

Dr. North: The Board will please come to order, and I will ask the Secretary to read the charges. Dr. Hurwitz, will you please come forward?

[fol. 14] (Dr. Hurwitz steps forward, and Dr. Enlow reads the complaint, which is, as follows:

Said complaint is as set forth at page — of this abstract.

Dr. North: Dr. Hurwitz, you have heard the charge, are you ready to proceed?

Mr. Davis: We will answer for the Doctor. We desire to file a motion to quash and dismiss these proceedings for various grounds stated in the motion. Which motion was duly filed.

Mr. Davis: We will ask the clerk to read the motion. Which was done and which motion is, as follows:

BEFORE THE MISSOURI STATE BOARD OF HEALTH

In re Application of ROY COYNE, Prosecuting Attorney, etc., to Revoke License of Dr. LEON HURWITZ

Now at this day comes Dr. Leon Hurwitz and moves the Hon. Missouri State Board of Health to quash and dismiss the application or complaint filed in the above cause by Roy Coyne, Prosecuting Attorney of Jasper County, Missouri, to revoke the license heretofore issued to your movant to practice medicine and surgery in this state, for the following reasons, viz:

(1)

Because the complaint filed was filed without authority of law and this Honorable Board is without jurisdiction by reason thereof.

[fol. 15] (2)

Because Section 7336, R. S. 1919, under which this proceeding is being prosecuted is null and void, for the following reasons, viz:

(a) Because said section does not authorize or empower this Board to issue subpœnas or other process for witnesses, and for the production of books, papers and documents to be used as evidence in the trial of this proceeding, and necessary to the defense of your movant against the charge preferred.

(b) Because said section is in conflict with Section 30 of Article 2 of the Constitution of Missouri, and with the 14th Amendment to the Constitution of the United States, in that said section authorizes and empowers this Hon. Board to revoke and cancel the license of your movant to practice medicine and surgery in this state without due process of law, in that no compulsory process of law is afforded your movant to compel the attendance of witnesses to be used upon the trial of this proceeding, and for the production of books, papers and documents to be used in evidence upon the trial of this proceeding.

(3)

(c) Because this Hon. Board refused, upon application therefor, to issue subpœnas to witnesses and the production of documents to be used upon trial of this cause.

[fol. 16] (4)

Because the law under which this proceeding is being prosecuted is so vague and indefinite that it does not afford and provide the necessary machinery for an orderly, fair and impartial investigation of and defense of the charge preferred.

(5)

Because the law under which this proceeding is being prosecuted was not enacted in the manner and form provided in the Constitution.

Leon Hurwitz, by Owen & Davis, His Attorneys.

Dr. North: After having heard and considered the motion, it is overruled, and we will proceed with the trial.

Mr. Davis: We have a further motion which we wish to file, and with the permission of the Board I will read it.

Said motion was duly filed, and is, as follows:

BEFORE THE MISSOURI STATE BOARD OF HEALTH

In re Application of ROY COYNE, Prosecuting Attorney of Jasper County, Missouri, to Revoke License of Dr. LEON HURWITZ to Practice Medicine and Surgery in this State

Now at this day comes Dr. Leon Hurwitz and states and shows to this Hon. Board that, on the 4th day of April, 1923, he requested of

Dr. Cortez F. Enloe, Secretary of the Missouri State Board of Health, a subpœna, directed to the Sheriff of Newton County, Missouri, for [fol. 17] Dr. A. W. Benton, commanding him to be and appear before this Hon. Board on this date and testify on the trial of the above cause; and also requested a subpœna, directed to the Sheriff of Jasper County, Missouri, for Dr. U. G. Hoshaw and for Dr. A. Benson Clark, commanding them to be and appear on this day before this Hon. Board and testify on the trial of this cause; also requested a subpœna duces tecum for J. M. Jackson, directed to the Sheriff of Jasper County, Missouri, and commanding said Jackson to have and produce at the trial of this cause to be used in evidence on the trial of this cause, prescription No. 15760, which said prescription was written for Almeda Stewart by Dr. —— and filled by the Jackson Drug Company of Joplin, Missouri, and given for the purpose of causing an abortion of said Almeda Stewart, which said prescription was issued and filled prior to the 1st day of May, 1922, and which prescription was not issued by the undersigned. Wherefore it is prayed that this cause, by reason of the premises, be quashed and dismissed.

Leon Hurwitz, by Owen & Davis, His Attorneys.

STATE OF MISSOURI,
County of Jasper:

Leon Hurwitz, being first duly sworn, on his oath says that the facts stated in the above motion are true according to the best of his knowledge and belief.

Leon Hurwitz.

[fol. 18] Subscribed and sworn to before me this the 6th day of April, 1923. A. E. Taggart, Circuit Clerk.

Which said exhibits attached to said motion, are as follows:

Joplin, Apirl 5, 1923.

Doctor C. F. Enlow, Sec. State Board of Health, Jefferson City, Missouri:

Issue and mail to me at once Subpœna for A. W. Benton in case against Hurwitz directed to Sheriff of Newton County. Also issue subpœna duces tecum for J. M. Jackson same case commanding him to bring prescription number 15760 directed to Sheriff of Jasper County; also subpœna for A. Benson Clark and U. G. Hoshaw directed to Sheriff of Jasper County.

Leon Hurwitz.

Jefferson City, Mo., 11:40 a.—., April 4, 1923.

Dr. Leon Hurwitz, Joplin, Mo.:

The State Board of Health has no power to issue subpœnas for witnesses to compel their attendance. Witnesses must attend voluntarily. See Section 7336, R. S. 1919.

Cortez F. Enlow, M. D., Sec.

Dr. North: The second motion is overruled. Are you ready to proceed with this case, gentlemen?

[fol. 19] Mr. Davis: De desire to file an application for continuance on the ground of an absent witness, which motion was duly filed, and is, as follows:

BEFORE THE MISSOURI STATE BOARD OF HEALTH

In re Application of ROY COYNE, Prosecuting Attorney of Jasper County, Missouri, to Revoke License of Dr. Leon Hurwitz to Practice Medicine and Surgery.

Now at this day comes Dr. Leon Hurwitz and states and shows to the Hon. Missouri State Board of Health that he can not safely proceed to trial at this time of the above entitled cause on account of the absence of Arzula Hanks who is a material and competent witness for the undersigned upon the trial of the above entitled cause.

That the home of said Arzula Hanks has been in the City of Joplin, Missouri, until recently when she moved to the State of California. That affiant did not learn that said Arzula Hanks had moved from this state to the State of California until on or about March 30th, 1923.

That said Arzula Hanks is not absent by the consent, procurement or connivance of the undersigned.

That this application for a continuance is not made for the purpose of vexation or delay but is made in good faith for the purpose of securing justice upon the trial of the above cause.

That if this cause is continued for a period of a month or six weeks the undersigned can and will take the deposition of said Arzula Hanks to be read in evidence upon the trial of this cause.

That the undersigned believes that if the said Arzula Hanks were present at the trial of this cause she would testify that, prior to the [fol. 20] 1st day of May, 1922, she accompanied the Almeda Stewart, mentioned in the complaint filed herein by said Roy Coyne, to the office of Dr. ——, Joplin Missouri, and that said Stewart told her, the said Arzula Hanks, that she the said Almeda Stewart was pregnant, and that she was going to see said Dr. —— for the purpose of having an abortion performed upon her, the said Almeda Stewart; that said Almeda Stewart took medicines prescribed by said Dr. —— for the purpose of producing an abortion, that said medicines were procured from the Jackson Drug Company, upon a prescription written by said Dr. ——, and not by this defendant.

Leon Hurwitz.

Subscribed and sworn to before me this the 6th day of April, 1923. John Costillio, Notary Public, Jasper County, Missouri. My notarial commission expires on the — day of ——, 192-.

Dr. North: The continuance is refused, and I desire to make this statement: This Board of course rules it is not a judicial body, but we function under certain statutes, but as the same time counsel

for defendant by presenting these legal technicalities—and naturally they want to preserve the record so if they want to appeal they are within their rights, but I don't think we are accomplishing anything by this delay: You have had due notice and plenty of time to get your witnesses.

[fol. 21] Mr. Davis: We now request the Board to continue the hearing upon this case until after the April term of Circuit Court of Jasper County, for the reason there is now pending in that court a charge against Dr. Hurwitz, charging him with the crime of criminal abortion on this same Almeda Stewart, upon an information filed by Roy Coyne, prosecuting attorney of this county. It will be unfair and unjust to try defendant before this Board at this time in advance of the trial in the Circuit Court, because he will have to take the witness stand before this Board, in his own behalf, and this Board not being a court—men learned in your line, but not learned in the laws or rules of evidence, he will be subjected to examination not permitted in Circuit Court, upon this charge, and under these circumstances, it will be very prejudicial to the defendant to try him at this time upon these charges.

Dr. North: Counsel will bear in mind that this call has been issued, and you have had due time to prepare your case, and this matter is one which is being tried under certain statutes, and the Board still insists that we proceed.

Dr. James, being produced and sworn on behalf of the prosecution, testified, as follows:

My name is R. M. James, residence, Joplin, Missouri. Profession physician, and was on the 1st day of May, 1922, and had been for about 17 years. I am acquainted with Dr. Leon Hurwitz. I have known him for ten or twelve years. He was a practicing physician on May 1st, 1922, in the City of Joplin, Missouri. I am acquainted [fol. 22] with Almeda Stewart. I have known her since April 11, 1922. I saw her on April 11, 1922, about ten-thirty, P. M. at 601 Byers Avenue, Joplin, Jasper County, Missouri. I saw her in an upstairs room at the southeast corner of Sixth and Pearl. I made an examination of her at that time. She was suffering excruciating pains in the abdomen, and was bleeding from the vagina, or uterus, rather, and stated that she had had an abortion induced.

Mr. Owen: I object to what she states; he can give the result of his examination, but not what some one told him.

She was suffering extreme pain, rolling and tumbling on the bed, crying and bleeding. The pain was in the lower abdomen. My opinion was at the time she was aborting, and necessitated the administration of an anodyne for the relief of pain. I found no packing, she told me she had removed it. At that time, the mouth of the uterus was soft, patulous, and bleeding. I did not use any speculum, I merely examined her digitally. She was pregnant at that time. She was pregnant about two months.

Q. What was the condition of the mouth of the uterus with reference to being open or closed?

A. Well, patulous means soft and open, it wasn't—the opening wasn't so large that the fœtus could pass.

It would be impossible to tell at that time from my examination, to tell how large the opening in the mouth of the uterus was. There had to be some pain, or it wouldn't have been bleeding. That condition was not such as is found in a normal condition of pregnancy. [fol. 23] The next morning I was called again, and the condition of the patient was practically the same, and I told them they would have to go to the hospital to be curetted; that the uterus must be emptied, and they said they would let me know about that. I refused to take her to the hospital until she had made a statement to me relative to her condition. She wrote this statement, or I wrote a statement at the time and she signed it, witnessed by Mrs. Sue Harmon, I believe it is. I wrote that at her bedside in her presence. She told me what to write. I copied what she wrote. I went down to the court house on the morning of the 12th to see the assistant prosecuting attorney. While I was there he called Billy Gibson, the chief of detectives, and Wallace Porter, Deputy sheriff at that time. I took them in my car out to the place, 601 Pearl, and they got out of the car and went in the house where Almeda Stewart was rooming and living, and I drove on.

I was called again in a little while and went out there and sent her out to St. John's Hospital, and took her to the operating room, and had Dr. Tyree give her an anesthetic, and in the presence of the sister in charge and the nurses out there, I dilated the uterus sufficiently to empty it of its contents, and sent the specimens to the laboratory.

Q. State, if you know of your own knowledge what the contents consisted of?

A. I delivered the fœtus, the placenta, or afterbirth, on the operating table at St. John's Hospital, on April 12th, 1922.

[fol. 24] Q. Could you tell from the appearance whether or not there had been an abortion committed upon her?

A. The mouth of the uterus showed traumatism, or injury, which was the only indication. The placenta is the after-birth, and the fœtus is the baby. I could not tell from the condition I found what means or instruments were used to produce the abortion.

Q. Could you tell whether a drug or an instrument?

A. I don't think a drug will do it.

My conclusion is, from my examination, that a uterine dilator, or sound, uterine sound was used. This instrument is an instrument you induce into the mouth of the womb to stretch the mouth of the womb.

Q. The induction of that instrument and the opening of the mouth of the womb causes what results in the case of pregnancy?

A. An abortion.

Q. That is your opinion what was done in this case?

A. Yes, sir.

Mr. Owen: We move to strike out the last answer for the reason that it is the duty of this Board to pass on whether an abortion was

committed, from the evidence, and not for this witness to give his opinion.

Dr. North: Objection overruled.

Mr. Owen: We except.

I have been practicing obstetrics for about 20 years, and in the course of my practice I have had lots of obstetric cases, and in all stages.

[fol. 25] Q. What was the condition of health, aside from the local condition, of Almeda Stewart?

A. Normal.

Q. Was her condition such as to require the delivery, or performance of this abortion, you described?

Mr. Owen: We object; let him state the situation and condition, because his expression of opinion would be accepting his view instead of the tribunal's view of the situation; let him state facts and not his conclusion.

Dr. North: Proceed.

Q. I will strike out the word delivered, and state the performance of an abortion to save her life or that of an unborn *quick* child?

A. I found her otherwise normal, except this abortion.

Q. Then, would you say her condition was such as not to necessitate the performance of an abortion to save her life or that of an unborn child?

Mr. Davis: We desire to make the same objection.

A. I could see no reason why it should have been performed.

Cross-examination by Mr. Owen:

Q. Are there certain drugs that are given or taken by individuals in early pregnancy for the purpose of assisting or producing abortion, as we common people call it, bringing them around?

A. There are drugs given for that purpose, but I have never seen one that would do it.

F. E. ergot means fluid extract of ergot, and H. V. C. means Hayden's viburnum compound, which is a sedative. I have heard [fol. 26] of these drugs being taken for the purpose of assisting and bringing pregnant women around.

Q. Would it have anything to do one way or the other in your experience as a surgeon?

A. No, sir.

Q. It wouldn't do at all.

A. Fluid extract of ergot given in sufficient quantities might produce an abortion.

Ergot is given to prevent hemorrhage. Hayden's viburnum is what we call a uterine sedative; it quiets the uterus.

Q. It never would be necessary to give that unless some attempt had been made or some symptoms shown of approach of abortion?

A. Oh, yes; given often to quiet the uterus; given in cases of dismenorrhea.

I am not the Doctor James who issued a prescription to Almeda Stewart on the Jackson Drug Company for "F. E. Ergot one ounce; H. V. Cs., ounces three," with sig. "Teaspoonful every three hours," and signed "James M. D." I have no knowledge of that prescription. Dr. Ed James may have given it. There are no other Doctor Jameses other than my brother and myself.

Q. When you went out to see this party your first examination, did that to your mind suggest there would have to be a cleaning out of the uterus?

A. Always, in the case of an abortion; the suggestion always presents itself.

[fol. 27] I only made a digital examination of her the night I was to see her. And from my examination of her I concluded that a complete cleaning out of the uterus would have to be made, if it didn't throw it off itself. I couldn't tell from my examination of her whether she had tried herself to commit an abortion by the use of instruments. I could tell by the feel that the mouth of the womb showed tenderness and irritation and was swollen, but could not tell how long that condition had been present at that time. I only gave her a hypodermic to quiet her down. I determined next morning that she would have to go to the hospital. I did not call in another doctor to join in my opinion whether the abortion should be further completed I acted upon my own judgment. I did not examine her next morning, when I went to the house, with an instrument. She was about the same next morning as the night before. I was sent for next morning, 'phoned for. I never learned that she was a patient of my brother Ed James, and haven't learned it yet.

Q. Did you know that she had been under the treatment of Dr. James for something like a month?

A. I think he said he saw her once in his office.

The night I was out there I could not tell that the uterus had been packed with a tampon. The uterus might be a little to one side, or a little back or front and still be in the normal position. There was no way to tell whether the uterus had been misplaced and put in place and held by a pack. The next morning when I went back she just told me that it was taken out. I didn't see it. There [fol. 28] was no pack there at that time. I went to the house at 8:30 and the operation was had at 11:40 A. M. She suffered severely all night and was suffering at 8:30 in the morning. I saw at that time that the abortion would have to be completed. It didn't make any difference how much examination you might make that night; she might have thrown that off in an hour or two hours; the uterus might have emptied itself.

Q. You knew at ten o'clock that night that there was no way for that woman to become a mother of a living child during that pregnancy?

A. No, sir; I didn't know that.

Q. It would either have to be thrown off or cleansed out by instruments?

A. Yes, sir; I knew it was an inevitable abortion.

Redirect examination by Mr. Caruthers:

Q. The first time you saw Almeda Stewart and examined her, I will ask you to state whether or not her condition was such as to require the performance of an abortion upon her to save her life or that of an unborn child?

A. That was my opinion at that time; but these conditions work out differently in different people.

Q. The first time you saw Almeda Stewart and examined her, state whether or not you found her condition such as to require the performance of an abortion upon her to save her life or that of an unborn child?

A. I found it necessary to complete an abortion.

Q. I might qualify this question in this way, was her condition [fol. 29] of health such, before any attempt had been made to produce an abortion, so far as you could tell, in such condition as to require the performance of an abortion to save her life or that of an unborn child?

Mr. Owen: We object, because the testimony shows the first time he saw her was at ten-thirty the night of April 11th.

Dr. North: Objection overruled.

A. So far as I could ascertain there was no reason for it.

Dr. Wilcoxen:

Q. If her physical condition was normal it would not lead you to think an abortion would be necessary to save her life?

A. No; I wouldn't perform any.

Dr. Wilcoxen:

Q. The next day when you saw her, did you find her condition such as to make it necessary to complete the abortion in order to save her life or that of the unborn child?

A. That is what I did; yes, sir.

Dr. Wilcoxen: Was it necessary to do that?

A. Yes, sir; if it hadn't been I wouldn't have done it. She was, on my first visit suffering with an inevitable abortion; in other words she was going to abort, she was aborting.

Recross-examination by Mr. Owen:

At 10:30 I made such an examination as was necessary in my judgment to determine the condition of the patient, and at that time, from my examination, I determined that she would either voluntary abort, or would have to have assistance in the act. I made no arrangements at that time to see her again. There was nothing said [fol. 30] as to whether I was to return. No, sir, I was not employed as a physician to take charge of the case; they employed me to come down and at least put her to sleep.

Q. You didn't put her to sleep with your digital examination, did you?

A. No, sir; with my opiates. I told them to call me if they wanted me again and they called me next morning.

Q. Did you think at the time you left there that Almeda Stewart would relieve herself from the suffering without aid?

A. No; I didn't know whether she would or not; there was no way to tell; my opinion was that she was having an inevitable abortion at that time.

She was aborting at that time, and eventually probably would have thrown it off herself, but the danger is, I say, the danger of infection, leaving the debris and fœtus and stuff of that sort in the uterus. It was not my judgment, next morning at eight-thirty that she would complete the abortion without the assistance of a surgeon. I was convinced that it was necessary.

Redirect examination by Mr. Caruthers:

Q. State to the Board the mental attitude you found Almeda Stewart in on your first visit with reference to her desire to be relieved of her pregnant condition?

A. She wanted relief from her suffering.

Dr. Wilsoxen: Was she especially desirous of having relief from this pain, or anxious about the outcome whether she was going to abort?

[fol. 31] A. She was suffering to such an extent she wanted any thing done that would relieve her, and you have to relieve the cause of the suffering or you don't relieve her.

It was an abortion induced. I took a history of the case in making my diagnois, and in doing so it was necessary to ask questions of the patient.

Dr. Enlow: When you first saw her you said she was anxious to be relieved of the pain. Was her mental attitude that of a normal mother that was anxious to go ahead and bear this child, or was the mental attitude not alone to get rid of the pain but to get rid of the baby or pregancy, so to speak?

A. Well, she wanted relief of the pain by any means that you could use to relieve her of it, and in learning the history of the case we must take subjective as well as objective symptoms, and in as much as I had the information that the uterus had been dilated, which would induce an abortion, there wasn't any other thing to do but empty the uterus.

She wanted to be rid of the pregnancy.

Q. I will ask you as to whether Dr. Leon Hurwitz, who is on trial now before this Board—do you meet him in medical meetings here?

A. No, sir.

Q. Do you call him in consultation?

Mr. Davis: We object to that; it is immaterial to any issue in this case.

Dr. North: Objection overruled.

Witness excused.

[fol. 32] WALLACE PORTER, produced, sworn and examined on behalf of the prosecution, testified:

Direct examination by Mr. Caruthers:

I live in Joplin, and have lived here for about seven years. On May 1, 1922, I was deputy sheriff of Jasper County. I have known Dr. Hurwitz about 14 or 15 years. I know who Almeda Stewart is, but am not acquainted with her. She lived on April 12, 1922, at 601 Pearl St., Joplin, Missouri. I was at her residence on that day about 9 or 10 o'clock in the forenoon. Wm. Gibson was with me at the time. He and I were in an adjoining room with reference to the room which she occupied. There was a closed door between the two rooms. While in this room I heard a conversation between Almeda Stewart and Dr. Hurwitz. As I remember it, he asked her what was the matter, or asked her, "Have you been hurting," or "Are you hurting——"

Q. You have a right to look at the memorandum to refresh your memory, if you want to.

A. He asked her if she had been flowing; if she had passed any thing, and asked if she had removed the packing as he had told her to do; I don't recall her answer.

Dr. Hurwitz wanted to make another examination of the girl. Some one laid out a number of instruments; we could hear them; we didn't see them; we could hear the metal. He told her he would have to examine her, and she kept complaining she didn't want to because it would hurt her, and the doctor told her she should have come to him a month earlier, it wouldn't have been nearly so [fol. 33] bad; if she was old enough to go running around with the boys and get in this condition she was old enough to stand the pain of examination, and she continued to refuse.

Q. Give her words, if you can.

A. It would hurt, I don't remember just what she said; she kept complaining it would hurt her; she couldn't stand the pain, and she said she had told him the day before not to use instruments and he had done so and it hurt her and she couldn't stand for the examination now, and he told her it would be necessary for her; that he had lots of these cases; some time it would be necessary to wash out the womb for seven or eight days at a time, and other women stood it and she could, and told her she had called for him and he had the instruments ready, and if she continued to refuse not to call him again, because he might be in Carthage or Webb City or some other place and he couldn't come; I think that is practically the extent of the conversation.

Q. Following that conversation on that occasion did you make any record or memorandum of it?

A. As soon as I got back to the office I wrote down as near as I could remember what was said.

Cross-examination by Mr. Owen:

I recall testifying at the preliminary hearing of Dr. Hurwitz, and being recalled after Gibson had testified. I was not at the house at the time Dr. Hurwitz was called. I was informed that he had been called. Dr. James was not there at the time Dr. Hurwitz came. As I recall it, Dr. James took Gibson and myself down there [fol. 34] in his car. I was not in the room where the patient was. Just went to the door and saw her. I am not sure but think Gibson talked to her. I had no talk with her.

Q. Now, when you folks were there in the room Dr. James was in there talking to Almeda Stewart?

A. I believe he was in the room when I came to the door; he either came to the door together, and Dr. James went on in the room, or he was in the room when I came to the door.

Q. When you people went into this adjoining room Dr. James remained in the room with the patient, while you and Billy Gibson was in the other room?

A. My remembrance is he was in there; I don't know whether when we were in the adjoining room or not.

I did not hear anything James said to her.

Q. Now, you say you heard some instruments rattling?

A. Yes, sir.

Q. You didn't see Dr. Hurwitz at all?

A. I saw him when he went out the front door.

Q. Have his regular and ordinary physicians' and surgeons' case with him?

A. Apparently so; yes, sir; some small cabinet or hand bag he carried in his hand.

Q. What you ordinaly notice physicians carry?

A. Yes sir.

[fol. 35] I don't recall Dr. Hurwitz being city physician for several terms; I possibly knew it at the time.

Witness excused.

W. F. Gibson, being produced, sworn on behalf of the prosecution, testified:

Direct examination by Mr. Caruthers:

I live in Joplin. I am chief of detectives and have been for about seven years. I remember of being called to 601 Pearl Street, the home of Almeda Stewart, on or about the 12th of April, 1922. I was called from the station to the prosecuting attorney's office. Upon arriving there I was told Dr. Hurwitz was about to commit an abortion, and they wanted me to go along with Wallace Porter and go in an adjoining room. Dr. James was there at the time; so I went

out there and got in the adjoining room where this girl was. I never saw the girl before. We went out to the house with Dr. James, in his car. He went in the house with us. He did not remain; he left and shortly Dr. Hurwitz came. We were there half an hour or more before Dr. Hurwitz came.

Q. I will ask you to tell the Board what conversation you heard between Dr. Hurwitz and Almeda Stewart after he arrived at her home.

A. He asked her how she felt, and she said she felt pretty bad. I could not understand what she said all of the time; she was flouncing around in the bed quite a bit; there was a window on the west side, and we could see through the crack of the door; it [fol. 36] was opened just a little bit, just a small crack you could see through. I was looking part of the time through that crack and they had her bed up pretty near against this door, where her head was; could hear them talk pretty plain, especially every thing Hurwitz said, and he asked her if she had removed the cotton he had put in there, and she said yes, and he asked her if she was flowing any, and she said a little bit and she said she was in an awful lot of pain, and he said, "I will have to see what is the trouble and make an examination." "Well," she says, "No, I don't want you to make any examination; you told me yesterday you wouldn't use any instrument and you did, and I won't let you make any examination today," and he said, "I will have to, there is something in the mouth of the womb that I will have to take away and you will not get through until I do," and she said she would not let him do it, and he said, "you will not get any better until I do." I can't place just the words, but it is like that all the way, and they argued a little bit along that line, and she said she wouldn't let him examine her that day, and he said, "all right, you may want me tomorrow or tonight and I may not be here; I may be in Webb City or Carthage or some other town and not be here," and so he says "there is something in the mouth of the womb that needs to be removed" and "Well," she says, "I ain't going to let you examine me," and he had his instrume*tus*; I could hear those instruments on the table; apparently had them spread out; I could see him part of the time and part of the time I couldn't; he said, "I have everything ready and you had better let me see if there ain't something that needs to [fol. 37] be removed," and she said, "I ain't going to let you see nor use any instrument; you said you wouldn't use any instruments yesterday and you did, and you said it wouldn't hurt and it did," and he said, "you are strong enough to stand it and I have done that on many a girl and you are just as able to stand it as they are"; he says, "If you had come to me sooner it wouldn't have been near so serious; it is kind of a serious operation now, you have waited so long"; he says, "I told you any time you got to itching and you let these boys scratch it, what would be the result, and you got that way and have no body to blame but yourself, and you came to me yesterday and asked me to get rid of it for you, and I am doing my best, and I have come back to finish my job and you won't let

me, and there is nothing else I can do." There was some other talk, but I don't remember all of it.

Cross-examination by Mr. Owen:

I do not know Dr. Ed James, but have seen him. I do not believe he was at office of prosecuting attorney when I arrived that morning. I have been a police officer and deputy constable in this town for the last twenty years. I did not take down or make a memorandum of anything that was said in that room. Wallace Porter was with me, and he had the same chance to see and hear that I did.

Q. You know Mr. Porter at the time, or shortly afterwards, wrote down all that was said, don't you?

A. Yes, sir; we talked it over together.

[fol. 38] Q. You and he wrote down everything at that time recollected?

A. Yes, sir.

Q. Now, Mr. Gibson, you didn't see any instruments of any kind or character?

A. I could see when he went in he had a hand-bag or little something in his hand and setting on the table, and I could hear the instruments rattling when he apparently laid them on the table, but I didn't see the instruments. Dr. Hurwitz was there in the house about half of an hour. Porter and I were in the room there about half an hour before he came.

Q. Was Dr. Hurwitz summoned to that house after you and Porter were in that room?

A. They said they were going to call him.

Q. So to your knowledge, Dr. Hurwitz didn't touch the patient or anything of that kind on that occasion?

A. Touch her?

Q. Yes, sir.

A. I heard him say, "Open up your legs" and she said, "I won't do it."

Q. Do you know whether he touched her?

A. I couldn't see him touch her, and I couldn't see her at that time.

Mr. Owen. Let the record show in this case the defense hasn't objected to any member of the Board asking questions in the case, and I don't know just the effect of consultation of one member of the Board with counsel for the prosecution in this case. The reason [fol. 39] I am making this objection, I have noted one member of the Board advising with the prosecuting officer throughout the case, without knowledge of defendant or defendant's attorneys of the questions, and I don't know what influence those things are having on the minds of the members of the Board.

Mr. Caruthers. Let the record further show that this member of the Board is the secretary of the Board who keeps the records and minutes of the Board, Dr. C. F. Enlow.

Witness excused.

Roy Coyne, produced, sworn and examined on the part of the prosecution, testified, as follows:

Direct examination by Mr. Caruthers:

I reside in Joplin, Missouri. I am prosecuting attorney of Jasper County. I was elected in 1922. I do not know Almeda Stewart. I know her sister Viola Norvell.

Q. I will ask you if you can tell the Board whether these two sisters are not to be found in Joplin, or vicinity?

Mr. Owen: We object to that, for the only evidence they can show is the issuance of a subpoena and return nulla bona.

Dr. North: Objection overruled; because as a matter of fact, the point at issue, the prosecuting attorney ought to know if any effort has been made to ascertain the whereabouts of the evidence.

[fol. 40] Mr. Davis: We object to that line of questioning; it is wholly irrelevant and immaterial and doesn't involve any issue involved in the hearing.

Dr. North: Objection overruled; proceed.

A. They are not.

Q. I will ask you if in your official position as prosecuting attorney you have made any effort to locate Almeda Stewart and Viola Norvell?

A. Yes, sir; during the January term of *cui*-cuit court at Joplin, 1923. I had a subpoena issued for Almeda Stewart; she couldn't be found in this county; I know now that she is located at Tulsa, Oklahoma. Viola Norvell is also there.

Cross-examination by Mr. Owen:

I can not state her street address. The post master at Tulsa can give you her street address, and the chief of detectives can give you her location. I got this information last Tuesday.

Dr. Stormont, produced, sworn and examined on the part of the prosecution testified, as follows:

Direct examination by Mr. Caruthers:

We desire to object to this witness testifying, for the reason that at the request of the defendant, the rule was invoked, and the witness has been present during the examination, and is cognizant of the testimony already given, and we object to him testifying.

Dr. North: If the witness offers to testify to any matter testified by other witnesses, your objection will be sustained, but as to other [fol. 41] matters, I think it should be received.

I live at Webb City. I am a physician and surgeon, and have been for about twenty-five years. I am not acquainted with Dr. Hurwitz.

I never saw him until today to my knowledge. I am president of the Jasper County Medical Society. I have known of Dr. Hurwitz as a practising physician for the past ten or twelve years, but never saw him until today.

DR. J. I. TYREE, produced, sworn and examined on the part of the prosecution, testified, as follows:

Direct examination by Mr. Caruthers:

I am a physician, and was on or about April 12, 1922. I am acquainted with Dr. James, also Almeda Stewart. I was present with Dr. James, on or about April 12, 1922, at the hospital in Joplin, at which time an operation was performed upon Almeda Stewart. I gave her the anesthetic. The young lady was flowing from the uterus, having cramps, apparently aborting. The doctor curetted the uterus, and the curetment resulted in bringing some placental substance and a foetus. The doctor was Dr. James. I made no examination of the patient, examined the placenta and foetus, and satisfied myself that is what it was. When she was brought to the operating room she was having occasional cramps of the uterus and flowing, discharging blood. She was, in my judgment, suffering from induced abortion. She was a big, strong, healthy girl; I don't think she had any thing organically wrong outside of that; I went [fol. 42] over her heart before I gave her the anesthetic, and there wasn't any thing wrong with the heart or lungs. An induced abortion is an abortion caused by the use of outside physical means.

Cross-examination by Mr. Owen:

After the anesthetic had been administered, and before we started to work, I went around and took a look at her vagina, after the speculum had been introduced, and you could at that time see the blood coming out of the uterus. Taking that in connection with the fact that the girl was complaining of cramps when she was put on the table, she was having pain, taking all this together that is what I draw my induction from. The speculum was inserted in the vagina so that I could see the mouth of the womb. I do not believe there would be any way of telling whether a needle or foreign substance had been used, unless there was some lacerations, and there was nothing of that kind.

Q. You knew this was a single girl?

A. Yes, I did.

Q. They sometimes bring about these things by their own effort with hat pins, sticks and pencils?

Q. Yes, sir. They do try to bring about these things themselves. Ergot is the chief ingredient of those quack remedies that are supposed to produce abortion, but which won't. Well, it looks like ergot and H. V. C. would counteract each other.

Q. What would you expect the taking of a teaspoonful of a pre-

[fol. 43] scription of one ounce of ergot, H. V. C. Q., three ounces would produce in a woman that was pregnant.

A. Well, I don't see where it would have any effect at all.

Redirect examination by Mr. Caruthers:

Ergot is about the only drug that we have that will tone up the uterus. It is supposed to be a stimulant to the particular type of muscle that is found in the uterus; for in following an obstetrical case, following the birth of a child where you have a flowing uterus, why, you will give a large dose of ergot to cause the uterus to contract and stop hemorrhage. It is given for the purpose of checking or stopping the hemorrhage, and not for the purpose of stimulating or inciting the flow. H. V. C. is a sedative, a nerve sedative. I don't believe I have ever prescribed the two drugs together in the amounts that have been read from the prescription, and I don't think I would prescribe it for producing or inducing an abortion.

Recross-examination by Mr. Owen:

Q. When you take too large dose of ergot after a child is born to contract the uterus that same dose administered before would tend to contract it; it would cause an abortion, wouldn't it?

A. A large dose?

Q. Yes.

A. Theoretically that is what is thought, but practically it never works; at least you won't—or I have never found any record of it.

[fol. 44] Q. The prescription I have read you, the quantity of which I have read you, in the doses suggested by myself, would you, knowing that had been prescribed to a patient, would you figure she was in a family way and they were given for the purpose of assisting her to come around, as we common people call it?

A. From my knowledge of the use of those two drugs I will answer this way: once in a while you take a girl who has changed climates or latitudes, or is suffering from a cold, her menstrual period will be more or less delayed several days and I think they use ergot, commonly give that to try to make her menstruate.

Dr. Enloe: Have you ever used this prescription for delayed menstruation of an unpregnant woman?

A. I don't do any obstetrical work, and I don't believe I ever have.

Dr. Wilcoxen: How long will it take fifteen drops of ergot every three hours to produce an abortion?

A. I don't think it ever would; it is a physical impossibility.

Dr. North: This prescription is almost a mythical one; there is no date on it, and it seems to have been touched upon so often by the cross examination of witnesses, the chair would like to have something specific; do you want to introduce this as evidence in the case?

Mr. Owen: I have asked him in regard to these particular things without any reference to that piece of paper, except for my own reference, and simply to emphasize that our effort to get that prescription signed by that doctor that gave it before this Board, and I emphasize

[fol. 45] our inability to obtain that process that would, bring it here and have it properly identified so it would be competent evidence; that is only a copy.

Dr. North: That should be a copy of the prescription; do you claim it is a copy of the original prescription, without any name on it?

Mr. Owen: The name of James is on it.

Dr. North: Without the name of the patient?

Mr. Owen: No, sir, that is the reason why we want the name of the person who filled it, and the person who delivered it to make it competent evidence, which we know can be produced in a court of law, because we can bring the person who filled it and the person who delivered it.

Dr. North: At this period of the case it is purely mythical.

Dr. North: I just wanted to make the point clear, because there is nothing to show on this prescription to whom it was prescribed.

Mr. Owen: No, sir; and I have no way of showing that fact unless I can get the process of this Board to bring the pharmacist who prepared it and delivered it.

Dr. North: The original is in the hands of the druggist?

Mr. Owen: Yes, sir.

Dr. North: Does the original have the name to whom this prescription——

Mr. Owen: I requested a copy, and this is the way they gave it to me. I requested the Jackson Drug Co., and from the manager of the store, and he gave me that, and I haven't any way of determining [fol. 46] whether it is true or not, and the only way I could get it is by subpœna duces tecum to bring in and identify the doctor's name and show it was filled in that drug store and delivered to the particular individual, or to some particular individual, and we can show that it was Miss Stewart; that is who got it.

Mr. Caruthers: I desire to ask counsel for defendant if after his client was served with notice of this hearing he made any effort to secure the deposition of the druggist who he claims filled the prescription here in question.

Mr. Owen: No, I did not; because as a lawyer, I apprehended I could not read the deposition with the witness living right here in town within a few seconds walk of this court.

Dr. Ed James, produced, sworn and examined on the part of the prosecution, testified, as follows:

Direct examination by Mr. Caruthers:

My name is E. D. James, and I reside in Joplin, Missouri, and I am physician and surgeon, and have been ever since 1901. I came here about the 1st of May, 1919, and opened an office here. I am acquainted with Almeda Stewart. She was in my office and I prescribed for her on March 15, 1922. I don't know that I remember exactly the prescription. She came to my office and com-

plained of having some kind of discharge, some trouble she was having, and I said, "get up on the chair and let's see about it," and she got up in my examining chair, and I asked her a few questions. [fol. 47] I made a digital examination, vaginal examination, and discovered she did have some white, milky discharge, or some leucorrhœa. I think I wrote a prescription for her at the time. Ordinarily in these cases of uterine disturbance, we use a uterine sedative, Hayden's virburnum compound, or something of that nature. I do not remember the prescription.

Q. I hand you this paper, and ask you to look at it and tell the board whether or not it serves to refresh your memory as to what you prescribed on the occasion you stated for Miss Stewart?

A. I don't know; this isn't my writing; this isn't my signature, and that is not the way I sign prescriptions; that may possibly be a copy of my prescription; I am sure I cannot remember that far back.

Q. Would the kind of medicine designated in that prescription and in the amounts directed for a dose in any way tend to produce or induce abortion?

A. It would have the opposite effect, absolutely.

Cross-examination by Mr. Owen:

I don't know how long I had been acquainted with her when she came to my office on that occasion, but not very long. I was not the family physician, but had treated her sister at one time. I don't know that she was pregnant in March 1922; she told me after our conversation she thought she was pregnant, probably. I knew she was a single girl. I only have a record of one visit to my office. I am sure she did not come to the office any more professionally or I would have a record of it. I was at home sick on or about the [fol. 48] 10 or 11 or 12th days of April, 1922. I recall of being called on one of these days to attend Almeda Stewart and was unable to attend her on account of sickness. Dr. Robert M. James is a brother of mine.

Witness excused.

Dr. North: Have you any witnesses for the defense.

Mr. Owen: No, sir; We were unable to get any process for witnesses; but I want Dr. Hurwitz to make his statement before the Board.

Dr. Leon Hurwitz, defendant, on behalf of himself, testified, as follows:

Direct examination by Mr. Owen:

My name is Leon Hurwitz. I am a physician and surgeon, and have been since 1901. I have practised mostly in Joplin. I was city physician in 1906. I was under Dr. John W. Nixon, at Camp Dodge, New Mexico, during the war. I was connected with the 97th

Division of the United States Army as first Lieutenant in the Hospital corps. I know Almeda Stewart. I first saw her on April 9th, 1922.

Q. Make any examination of her or give her any medicine or drugs, or any thing else?

A. No, sir; she told me her complaint, and I told her I had to make an examination and she didn't want to be examined and said she would be back the next day.

She returned the next day.

[fol. 49] Q. Just tell the Board whether you made any examination and what you found her suffering with and what the result of your examination was, and what you did?

A. She complained of pain in the abdominal region, suffering some headache and had a slight temperature of about ninety-nine and two tenths, and I asked her if she had been to any other physician and she said she had; that she had been to see Dr. James, and I told her the only way I could find out what was ailing her—she said she had missed——

Q. State what you did and what you found? and whether you made an examination?

A. I put her on the chair and made a digital examination and found the uterus misplaced and turned backwards, and I told her I had to replace the uterus and went to reach for some instruments, and she said she did not want any used and I told her they would not hurt her, and I put the speculum in and found the uterus gorged and looked like it had been tampered with.

Q. Tell the Board just the appearance of the surface you examined.

A. It was red and engorged, and I took a cotton and rolled it up and put a string on it and told her it was a tampon and said "I am going to put this in, and you leave it until you get home and that will put the uterus in its natural position and if there is any thing there trying to come out it will come out, and if not the pain will subside," and when I reached for another instrument to put it in she objected and I picked up the cotton tampon and put it in position [fol. 50] and took the speculum out, and I told her to use some douches the next day. I told her she might not miscarry; that the uterus was not in place. I didn't give her any medicine, but told her to use a lysol douche, a teaspoonful to a half gallon of water the next day. I did not use any instrument other than a speculum.

Q. So you could see what the situation was, and then put this pack in there?

A. With a pair of forceps.

Q. Tell the Board what position her womb was in when you examined her.

A. It was down and backwards, and I replaced it to its proper position.

Q. What was your object and purpose of this pack?

A. To hold it in proper position until she got home.

Q. Did you ever do anything else to her?

A. No, sir; not in the office.

Q. Did you see her again at any other time?

A. I think it was the next day or the day after that, I was called to the house, and I asked the name, and they told me what it was and I said "is she suffering," and they said "very much" and I took a lot of instruments and put them in my grip, prepared to do most anything necessary, and when I got there I found her suffering with pain as if she was miscarrying, and called for a bowl of water and put my instruments in the bowl of water with an antiseptic and told her to come around on the bed so I could see if [fol. 51] there was anything necessary to be done, and she refused and said it would hurt and that I had hurt her at the office, and I said "yes, it will hurt, but when you get in this condition you have to stand the pain."

Q. From your examination of her and your knowledge of her situation at that time could you tell what was necessary to be done, or if anything was necessary?

A. From the way she was suffering and the way she was acting, I thought it would be necessary to clean out the uterus.

Q. From your examination at your office did you think at that time it was necessary to do anything of that kind, or did you in your judgment believe it would adjust itself.

A. Well, it looked as though she had tampered with it or tried to do something and may be got one way or the other; it was impossible to tell. I did not give her any drugs or medicine or anything of that kind.

Q. I will ask you to state if you opened the mouth of the womb or touched the mouth of the womb in any way with any instrument that would cause an abortion?

A. No, sir; only putting my fingers up against the userus to replace it. I have described the instruments used and the method and manner in which they were used.

Q. Would those instruments, and the manner in which they were used produce an abortion in any way?

[fol. 52] A. It would assist the abortion, if it was already started, by straightening up the uterus so it could empty itself.

Q. I want this record to show the character of the speculum and how you used it.

A. The speculum just opens the vagina, so you can see the uterus plainly.

Q. Is it an instrument that is in common use for that purpose among the profession?

A. I used it on an average of ten or twelve times a day.

Q. For examination of patients?

A. For treating female troubles.

Q. There was nothing in the use of it or the method you employed to produce an abortion?

A. Absolutely not.

Q. Just tell the Board the character of the pack and how it was made.

A. Took a strip of cotton and rolled it in a roll and attached a string to it so it could be removed. We call them tampons. Some

doctors use wool and some use cotton. In this instance I used cotton.

Q. About what size roll was it necessary for you to use in your judgment to hold the womb in its proper place?

A. About the size of your finger. The cotton used was absorbent cotton, free of all foreign substances and infection.

Q. I will ask you to state if the method used which you employed [fol. 53] in using the tampon, the size of the tampon and the method of placing the tampon, would either of those things cause an abortion.

A. No, sir. In the examination of this patient I used and employed my best skill and judgment in the treatment of her and the course pursued, considering the situation I found.

Cross-examination by Mr. Caruthers:

I learned that she was a single woman. She was a big, stout girl.

Dr. North: You put the tampon in the vagina to straighten up the womb so it would empty itself.

A. No, sir: I straightened up the womb with my fingers, so the womb could empty itself; the uterus was out of place.

Q. What do you mean by emptying itself?

A. She was cramping and suffering with pains in her ovaries and her head, and said she had missed, and of course she might be pregnant, and I didn't know whether she was pregnant or not.

Q. Didn't you make the statement there that the tampon was placed there and the womb was straightened up so it would empty itself?

A. If a woman comes to my office suffering with pain a day or two after she should flow and you replace the womb in its natural position ninety-nine chances out of a hundred the next day she will tell you she has flowed without any cramps.

Q. Ordinary menstruation there wouldn't be any thing in the womb?

A. Blood.

[fol. 54] Q. What did you mean by emptying itself?

A. Anything that wants to come out that is there. If the womb is in its natural condition and the woman is miscarrying she will miscarry.

Q. Was it your opinion that she was pregnant?

A. I didn't know; I just replaced the uterus; she said she had missed.

Dr. Son: If you had a case and was quite sure abortion was going to take place, would you consider it to be good treatment to bring on a contraction by using a tampon?

A. No, sir: I don't think it would have any effect any more than to hold the uterus in its natural position.

Q. You don't think a foreign substance would bring on a contraction?

A. No, sir: it would if in the uterus, but not in the vagina at the mouth of the uterus to hold it up; the tampon was too large to put into the uterus; it was put in the vagina.

Dr. Enlow: Just up against the mouth.

A. Yes, sir; just to hold it in its natural position.

Q. In your opinion menstruation that has been delayed, and pregnancy, if the uterus is straightened up it will empty itself. In this case you said it was.

A. The uterus was inflamed as though it had been tampered with; therefore, I didn't know whether she would miscarry or not.

Q. Isn't it common knowledge that a pack against the uterus, if the uterus is pregnant, it will bring on contractions and the uterus will empty itself?

[fol. 55] A. Not in my practice.

Q. Isn't it one of the procedures of bringing on abortion?

A. No, sir; not as I know of; I make a specialty of treating female troubles, and I use the tampon in all case of misplaced uterus.

Q. In cases of pregnancy or suspected pregnancy?

A. Both ways; I don't put it up far enough; just enough to hold the uterus in its natural position. Not long ago I had a lady, a preacher's wife, for a patient; the uterus was misplaced and she was seven months' pregnant, and urinated every few minutes, and I placed the uterus and put a tampon under it, and she was up until child was born.

Q. You don't think by packing the uterus as it is——

A. Packing the uterus will.

Q. Packing the vagina will stimulate contraction?

A. No, sir; absolutely not.

Dr. Vitt:

Q. I would like to ask Dr. Hurwitz if he learned how many times she had missed?

A. She only told me once. She so told me the first day she was in office. This was April 9th, as I remember it. She missed the March menstruation. What I was trying to do was to stop the ovarian pain, she was complaining of pain on each side. I replaced the uterus and put the tampon in and told her to take it out as soon as she got home and go to bed, and follow with douche, a teaspoonful of lysol in a half gallon of hot water.

[fol. 56] Dr. Enloe: You say in answer to Dr. Vitt's question that you thought she was pregnant at the time of her first visit when the tampon was used?

A. Yes, sir; I thought she was pregnant.

Q. What instruments did you take out there the next day?

A. I took a whole bunch of instruments and put them in my grip. I was prepared to clean the uterus if necessary.

This was all of the evidence in the case.

Immediately following the close of the evidence appears the following:

"After all the testimony was in on both sides, the Board went into executive session. After considering the testimony taken in the case, the Board announced the following action:

Motion made by Dr. C. F. Enloe, and seconded by Dr. R. S. Vitt,

that the case of Dr. Leon Hurwitz be decided upon today. Motion carried.

Motion made by Dr. R. S. Vitt, and seconded by Dr. T. H. Wilcoxen, that the license to practice medicine and surgery in the State of Missouri of Dr. Leon Hurwitz be revoked for a period of fifteen years, and it is thereby so ordered. Motion carried.

The Board then adjourned."

STATE OF MISSOURI,
County of Cole, ss:

I, Cortez F. Enloe, Secretary of the State Board of Health of the State of Missouri, certify that the above and foregoing is a true, full [fol. 57] and complete copy of the minutes, record, transcript of evidence and proceedings in the matter of the hearing of the complaint of Roy Coyne vs. Leon Hurwitz, as fully as the same appears of record and on file in my office.

Witness my hand and seal of said State Board of Health hereto affixed, at my office, in the City of Jefferson City, State of Missouri, this 21st day of April, 1923.

Cortez F. Enloe, Secretary of the State Board of Health of Missouri. (Seal.)

RECORD ENTRIES

Now at this day comes relator in the above cause and files his petition for a writ of certiorari against the above named respondents. Said petition being seen and fully understood by the court, it is hereby ordered that the clerk issue and deliver said writ to the officers designated by relator.

Now at this day come respondents in the above cause and file their return to writ of certiorari issued herein.

Now at this day come relator and files his motion to quash the [fol. 58] record and proceedings of the Missouri State Board of Health revoking or suspending license of relator to practice medicine and surgery in this state.

ORDER OVERRULING MOTION TO QUASH

Now at this day the motion of relator heretofore filed to quash record and proceedings of the Missouri State Board of Health revoking or suspending the license of relator to practice medicine and surgery is overruled.

JUDGMENT—Omitted; printed side page 2 ante

[fol. 59] ORDER OVERRULING MOTION TO SET ASIDE AND VACATE JUDGMENT—May 19, 1923

Now on this day comes relator and files his motion to set aside and vacate judgment of the court affirming the order or judgment of the Missouri State Board of Health revoking the license of the relator for a term of fifteen years to practice medicine and surgery, and the same having been seen, read and fully understood by the court, the same is overruled.

ORDER GRANTING APPEAL—May 19, 1923

Now at this day comes the relator and files his affidavit for an appeal to the Supreme Court of Missouri, and said affidavit being in due form of law an appeal, is hereby granted to the relator to the Supreme Court of Missouri, and relator is given until on or before the third day of the next regular term of this court in which to file his bill of exceptions.

BILL OF EXCEPTIONS FILED

Now, on this 26th day of July, 1923, and within time allowed by the court, comes the relator in vacation and filed his bill of exceptions duly signed by the Hon. S. A. Bates, Judge, and sealed with the seal of the court, and prays that the same may be filed and made a part of the record in said cause, which is accordingly done.

[fol. 60] **Abstract of Bill of Exceptions**—Filed Aug. 1, 1923

MOTION TO QUASH—Filed April 25, 1923

Now at this day comes the above named relator to quash the order of judgment of the Missouri State Board of Health revoking the license of relator to practice medicine and surgery for a term of fifteen years, and to quash the record and proceedings had before said Board of Health, and returned to this court in obedience to the writ of certiorari issued in the above cause, in the matter of the application of complaint of Roy Coyne, prosecuting attorney of Jasper County, Missouri, to revoke the license theretofore issued to relator by said Board of Health to practice medicine and surgery in the State of Missouri, for the following reasons, viz:

(1)

Because said Roy Coyne was not authorized or empowered by law to file said complaint or application, and said Board of Health was [fol. 61] therefore without jurisdiction to hear and determine said complaint or application.

(2)

Because Section 7336, R. S. 1919, under which said proceedings were had and prosecuted, is null and void, for the following reasons, viz:

(a) Because said section does not authorize or empower said Missouri State Board of Health to issue subpœnaes or other compulsory process for witnesses, papers and documents necessary to the defense of one being tried by said Board of Health for revocation of his license to practice medicine and surgery.

(b) Because said section is in conflict with Section 30 of Article 2 of the Constitution of Missouri, and with the 14th Amendment to the Constitution of the United States, in that said section authorizes and empowers said Missouri State Board of Health to revoke and cancel licenses issued by it to practice medicine and surgery in this state without due process of law, in that said statute, nor any other statute, provides for the issuance of compulsory process, upon the application and at the request of the party being tried and whose license it is sought to have revoked, for the attendance of witnesses and for the production of books, papers and documents material and necessary to the defense of the person being tried.

(3)

Because said State Board of Health refused, upon the application and request of relator duly made to the Secretary of said Missouri [fol. 62] State Board of Health therefor, to issue subpœnaes for Dr. A. W. Benton of Neosho, Newton County, Missouri, and for Dr. U. G. Hoshaw and Dr. A. Benson Clark, both of Joplin, Missouri, who were competent and material witnesses for relator upon the trial of the charge against relator in the application of said Roy Coyne, and because said Board of Health, upon the application and request of relator as aforesaid, refused to issue subpœna duces tecum for J. M. Jackson, commanding him to have and produce a certain prescription, numbered #15760, and filled by the Jackson Drug Company, Joplin, Missouri, said Jackson being the proprietor of said drug store company.

(4)

Because said Board of Health committed error in overruling the two motions filed by relator with said Board of Health to quash and dismiss the complaint or application filed by said Roy Coyne, praying the revocation of the license issued to relator by said Board of Health to practice medicine and surgery in this state which said motions are contained in the record certified to this court, at pages 3, 4, 5 and 6 of said record.

(5)

Because said Board of Health committed error in overruling the application of relator herein for a continuance of the hearing of

the application or complaint of said Roy Coyne filed by him with said Board of Health praying the revocation of the license thereto-[fol. 63]fore issued to relator by said Board of Health authorizing relator to practice medicine and surgery in this state.

(6)

Because said Board of Health erred in overruling the oral request of relator to postpone the hearing of the complaint or application of said Roy Coyne for the revocation of relator's license to practice medicine and surgery, as shown by the record certified and returned to this court, at pages 9 and 10 thereof.

(7)

Because said Board of Health erred in admitting upon the trial of said complaint or application so filed by said Roy Coyne as aforesaid certain incompetent, immaterial and irrelevant evidence.

(8)

Because the record so made at the hearing or trial of said application of complainant of said Roy Coyne, as aforesaid, and filed herein, shows that the complainant failed to prove that a criminal abortion had been committed upon Almeda Etewart, the person named in the complaint or application of said Coyne.

(9)

Because the order or judgment of said Board of Health revoking the license of relator is wholly unsupported by the evidence, and is against the law of the case.

[fol. 64]

(10)

Because the record shows upon its face that relator was not afforded a fair and impartial trial of said complaint or application, and that he was deprived of his license to practice medicine and surgery without due process of law.

(11)

Because Section 7336, R. S. 1919, is too vague and indefinite to be enforced and does not provide the means or machinery for revoking licenses thereunder.

Owen & Davis, Attorneys for Relator.

JUDGMENT

Said motion was on the 19th day of May, 1923, and during the April term, 1923, of said court, and after argument, overruled, to which ruling of the court, the relator at the time excepted, and there-

upon the court, by its order and judgment, affirmed the finding, sentence and judgment of the Missouri State Board of Health, suspending relator from the practice of medicine and surgery in the State of Missouri for a period of fifteen years.

MOTION TO SET ASIDE JUDGMENT

On May 19th, 1923, and during the April term, 1923, of said court, and within four days of verdict and judgment, relator filed his motion to set aside the order and judgment of the court overruling motion of relator to quash record made and the order and judgment of the Missouri State Board of Health, in the matter of the application of Roy Coyne, prosecuting attorney, and to set aside and vacate [fol. 65] the order and judgment renderd herein, confirming the order and judgment of the State Board of Health, revoking license of relator to practice medicine and surgery in this state, which said motion was by the court, on the 19th day of May, 1923, and during the April term, 1923, of said court, overruled, to which ruling of the court, the relator at the time duly excepted. Said motion is, as follows:

IN THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI, AT JOPLIN, APRIL TERM, 1923

STATE OF MISSOURI at the Relation of LEON HURWITZ, Plaintiff,

v.

EMMET P. NORTH et al., Respondents

Now at this day comes the above named plaintiff and moves the court to vacate and set aside its order overruling plaintiff's motion to quash the record and the order and judgment of the Missouri State Board of Health, revoking license of relator to practice medicine and surgery in this state, and to set aside its judgment confirming and approving the order and judgment of said the Missouri State Board of Health in revoking the license of relator to practice medicine and surgery in this state, for the following reasons, to-wit:

(1)

Because the court committed error in overruling the motion of relator filed in this court to quash the order and judgment of the Missouri and State Board of Health revoking the license of relator to practice medicine and surgery in this state and to quash the record made by said Missouri State Board of Health in the matter of the [fol. 66] application of Roy Coyne, prosecuting attorney, to revoke the license of relator to practice medicine and surgery in this state.

(2)

Becausue Section 7335, R. S. 1919, under which the proceedings before said Missouri State Board of Health to revoke license of relator

were founded is vague and indefinite, in that it does not provide who may, nor authorize any one to, file complaints with said Board to revoke licenses of physicians and surgeons who may violate the terms and provisions of said section, and is therefore void, and the proceedings had thereunder are null and void.

(3)

Because the record certified to this court does not show relator to be guilty of the charges preferred in the complaint of said Coyne.

Because the action of this court in overruling motion of plaintiff to quash and the order and judgment of this court confirming the order and judgment of the Missouri State Board of Health revoking the license of relator deprives relator of a valuable right, a property right, without due process of law, and for the reasons set forth in motion to quash filed herein, and for the reason that the record herein shows relator was not afforded a fair and impartial trial before said State Board of Health.

Owen & Davis, Attorneys for Plaintiff.

[fols. 67 & 68] ORDER ENLARGING TIME

Thereafter, and on the 19th day of May, 1923, and during said April term, 1923, of said court, relator filed his application and affidavit for an appeal to the Supreme Court of Missouri, and by order of record relator was given until on or before the third day of the next regular term of said Circuit Court in which to prepare and file his bill of exceptions.

ORDER SETTLING BILL OF EXCEPTIONS

And now, on this 26th day of July, 1923, relator presents the above and foregoing as and for his bill of exceptions in the above cause, and prays that the same may be signed and sealed and made a part of the record in said cause, which is accordingly done this the 26th day of July, 1923.

(Signed) S. W. Bates, Judge Division No. 1 of the Circuit Court of Jasper County, Missouri.

[File endorsement omitted.]

[fol. 69] IN SUPREME COURT OF MISSOURI, DIVISION NO. 1

No. 25165

STATE OF MISSOURI at the Relation of LEON HURWITZ, Appellant,

vs.

EMMETT T. NORTH et al., Respondents

ARGUMENT AND SUBMISSION—April 10, 1924

Come now the said parties, by their respective attorneys, and after argument herein, submit this cause to the Court.

IN SUPREME COURT OF MISSOURI DIVISION NO. 1

[Title omitted]

JUDGEMENT—June 10, 1924

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jasper County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellant their costs and charges herein expended and have therefor execution.

[fol. 70] IN SUPREME COURT OF MISSOURI, *Division* NO. 1

[Title omitted]

OPINION

Realtor herein was a practicing licensed physician of Joplin, Missouri. Dates are not material to the real issues in the case, but it appears that on March 13th, 1923, Roy Goyne, Prosecuting Attorney of Jasper County, Missouri, filed a complaint with the State Board of Health, in which it is charged:

"That the said Leon Hurwitz has been and is guilty of unprofessional and dishonorable conduct, in this, to-wit, that he, the said Leon Hurwitz, on or about the 1st day of May, 1922, in the City of Joplin State of Missouri, unlawfully produced a criminal abortion upon one Almeda Stewart, a pregnant woman, he, the said Leon Hurwitz, being then and there not intending necessary medical or surgical treatment, and not being then and there engaged in an act necessary to preserve the life of the said Almeda Stewart, or that of an unborn child; and not then and there intending any injury other than the destruction of the pregnacy."

The complaint concluded with a prayer that the said board make inquiry as to the matters and things alleged and revoke the license of the said Leon Hurwitz.

Due notice was given Dr. Hurwitz, and a time fixed for a hearing of the charges. Hurwitz through his able counsel, first challenged, by motion to quash and dismiss the proceedings, the right of the board to proceed with the hearing for divers reasons set out in such motion. The pertinent portions of such motion will be left to the opinion. It suffices for this statement to say that the motion was denied by the board.

After the foregoing, counsel for Dr. Hurwitz filed a motion asking [fol. 71] for the issuance of a subpœna for named witness, and a subpœna dues tecum for other witnesses and documents. This motion was overruled by the board. These subpœnas had been declined by the secretary of the board some time prior to this written motion.

Next there was interposed an application for a continuance of the hearing owing to the absence of a named witness. The continuance was refused. Oral request was then made to continue the hearing over until after the April Term of the Jasper County Circuit Court, because there was then and there pending against him a criminal charge of abortion, as charged in the complaint before the State Board of Health, and a hearing before the board at the time would be prejudicial to the relator. This request was denied. There upon the State Board of Health heard the evidence, having the same taken in short-hand, transcribed and preserved as required by law. Upon the conclusion of the hearing the record shows:

"Motion made by Dr. R. S. Vitt, and seconded by Dr. T. H. Wilcoxen, that the license to practice medicine and surgery in the State of Missouri of Dr. Leon Hurwitz be revoked for a period of fifteen years, and it is thereby so ordered. Motion carried.

The Board then adjourned."

Dr. Hurwitz, the relator herein, then applied for and obtained from the Circuit Court of Jasper County a writ of certiorari directed to the State Board of Health, and said board made due return to such writ by certifying to such court a full transcript of all the proceedings in the case, including the evidence taken.

In the Circuit Court relator moved to quash the record for the following reasons:

"Now at this day comes the above named relator to quash the order of judgment of the Missouri State Board of Health revoking the license of relator to practice medicine and surgery for a term of fifteen years, and to quash the record and proceedings had before said Board of Health, and returned to this court in obedience [fol. 72] to the writ of certiorari issued in the above cause, in the matter of the application of complaint of Roy Coyne, prosecuting attorney of Jasper County, Missouri, to revoke the license theretofore issued to relator by said Board of Health to practice medicine and surgery in the State of Missouri, for the following reasons, viz:

(1)

Because said Roy Coyne was not authorized or empowered by law to file said complaint or application, and said Board of Health was therefore without jurisdiction to hear and determine said complaint or application.

(2)

Because Section 7336, R. S. 1919, under which said proceedings were had and prosecuted, is null and void, for the following reasons, viz:

(a) Because said section does not authorize or empower said Missouri State Board of Health to issue subpoenas or other compulsory process for witness, papers and documents necessary to the defense of one being tried by said Board of Health for revocation of his license to practice medicine and surgery.

(b) Because said section is in conflict with Section 30 of Article 2 of the Constitution of Missouri, and with the 14th Amendment to the Constitution of the United States, in that said section authorizes and empowers said Missouri State Board of Health to revoke and cancel licenses issued by it to practice medicine and surgery in this state without due process of law, in that said statute, nor any other statute, provides for the issuance of compulsory process, upon the application and at the request of the party being tried and whose license it is sought to have revoked, for the attendance of witnesses and for the production of books, papers and documents material and necessary to the defense of the person being tried

[fol. 73]

(3)

Because said State Board of Health refused, upon the application and request of relator duly made to the Secretary of said Missouri State Board of Health therefor, to issue subpoenas for Dr. A. W. Benton of Neosho, Newton County, Missouri, and for Dr. U. G. Hoshaw and Dr. A. Benson Clark, both of Joplin, Missouri, who were competent and material witnesses for relator upon the trial of the charge against relator in the application of said Roy Coyne, and because said Board of Health, upon the application and request of relator as aforesaid, refused to issue subpoena duces tecum for J. M. Jackson, commanding him to have and produce a certain prescription, numbered #15769, and filled by the Jackson Drug Company, Joplin, Missouri, said Jackson being the proprietor of said drug store company.

(4)

Because said Board of Health committed error in overruling the two motions filed by relator with said Board of Health to quash and dismiss the complaint or application filed by said Roy Coyne, praying the revocation of the license issued to relator by said Board of Health to practice medicine and surgery in this state, which said motions are contained in the record certified to this court, at pages 3, 4, 5 and 6 of said record.

(5)

Because said Board of Health committed error in overruling the application of relator herein for a continuance of the hearing of the application or complaint of said Roy Coyne filed by him with said Board of Health praying the revocation of the license theretofore issued to relator by said Board of Health authorizing relator to practice medicine and surgery in this state.

(6)

Because said Board of Health erred in overruling the oral request of relator to postpone the hearing of the complaint or application of said Roy Coyne for the revocation of relator's license to practice [fol. 74] medicine and surgery, as shown by the record certified and returned to this court, at pages 9 and 10 thereof.

(7)

Because said Board of Health erred in admitting upon the trial of said complaint or application so filed by said Roy Coyne as aforesaid certain incompetent, immaterial and irrelevant evidence.

(8)

Because the record so made at the hearing or trial of said application of complainant of said Roy Coyne, as aforesaid, and filed herein, shows that the complainant failed to prove that a criminal abortion had been committed upon Almeda Stewart, the person named in the complaint or application of said Coyne.

(9)

Because the order or judgment of said Board of Health revoking the license of relator is wholly unsupported by the evidence, and is against the law of the case.

(10)

Because the record shows upon its face that relator was not afforded a fair and impartial trial of said complaint or application, and that he was deprived of his license to *practice* medicine and surgery without due process of law.

(11)

Because Section 7336, R. S. 1919, is too vague and indefinite to be enforced and does not provide the means or machinery for revoking licenses thereunder."

We have set this motion out in full for the reason that it covers the several questions raised by the motions throughout the hearing before the State Board of Health. The motion to quash the record

was overruled by the circuit court and the finding of the board sustained. From such judgment the relator appealed. This outlines the case.

[fol. 75] The first attack made by relator upon the record of the State Board of Health is that the complaint purports to be filed by the prosecuting attorney, and that there is no authority in law for that officer to file such. The statute does not say by whom such complaints may be made. It contains no limitations in this regard. In State ex rel. vs. Goodier 195 Mo. l. c. 555, the charges were filed by named persons, citizens of the county. The same is true in State ex. rel. vs. State Board of Health, 266 Mo. l. c. 250. In State ex. rel. vs. Robinson, 253 Mo. l. c. 281, the complainants were three physicians, who described themselves as the "Board of Censors of Jasper County Medical Society." In State ex rel. Johnson vs. State Board of Health, 288 Mo. l. c. 663, the complainant was by H. J. Westhues, prosecuting attorney of Cole County, and in that respect is identical with the case at bar.

In none of these cases, however, is the question discussed. Nor are we cited to a case wherein such question is discussed. It is no doubt true that there was a criminal protection against Johnson, and the prosecuting officer knowing the facts preferred the charges before the State Board of Health. It does not follow from this that he was proceeding as the prosecuting Attorney. He had the right of any other citizen to prefer charges, and the words "Prosecuting Attorney of Cole County" could have been eliminated as mere surplusage, or as a mere description of the person, and there would be left charges by a citizen.

So in the case at bar. It may be true that the statute fixed the duties of a prosecuting atttorney and they do not cover a complaint of this kind, in his official capacity. The complaint in this case does not appear to be upon his oath of office as prosecuting attorney, except by the language following the name, which can be considered either as surplusage, or as a mere description of the person. We feel that the complaint and charges as made were (so far as this contention is concerned) sufficient to properly invoke the jurisdiction of the State Board of Health. The statute is certainly broad enough to [fol. 76] permit any citizen to prefer the charges, and a person is not deprived of citizenship by occupying the office of prosecuting attorney.

II

The second contention of learned counsel for relator is, that the State Board of Health had the power to issue process for witnesses and books and papers, and that such board abused its discretion, and wronged the relator in refusing to issue the subpœnas that he requested. No claim is made that there is express statutory authority to that end, but it is urged that there is an implied power within the terms of the statute. In State ex rel. vs. Goodier, 195 Mo. l. c. 559 (decided in October 1905) it was expressly ruled that there was no power to issue subpœnas possessed by the board. Many sessions of the legislature have come and gone since that ruling, and the

law-makers have been satisfied with our construction of the then existing statute, sec. 8514 R. S. 1899. This old statute authorized the board to "refuse certificates to individuals guilty of unprofessional or dishonorable conduct, and they (the board) may revoke certificates for like causes, after giving the accused an opportunity to be heard."

Under that statute we ruled that no process could be issued by the board. The legislature might have authorized the use of process, as has been done with some other bodies (other than courts) but it did not. When the statute was reduced to its present form (sec. 7336) it would have been an easy matter to have written into it a clause authorizing compulsory process for witnesses, but the legislature did not do so. Instead it provided for the taking and reading of depositions upon such hearings. It is unreasonable to believe that in view of our ruling in Goodier's case, the law-makers would have failed to make provision for compulsory process, had the intent been to grant the power to issue such process. The provision for depositions in such hearings, rather exclude the idea of compulsory process for witnesses. We do not believe that the statute confers the power, even by implication, for the issuance of compulsory process either [fol. 77] for witnesses or for books and papers, and we so rule. It was fully within the power of the law-makers to give authority for these hearings, and to prescribe just how the facts were to be obtained therefor.

III.

The relator next urges that if we give the statute the construction just given it in the foregoing paragraph, then the statute violates the due process clauses of both the State and Federal constitutions i. e. in that it authorizes the taking of his license (a valuable right) without a hearing or trial before a tribunal of competent jurisdiction. The license to both a lawyer and a physician have been denominated valuable rights, of which they can not be deprived without due process of law. State ex rel. vs. McElhinny 241 Mo. 592; State ex rel. vs. Robinson 253 Mo. 271.

It was no doubt in view of these rulings, that the present section 7336 of R. S. 1919, was enacted. Here we have first a hearing before the State Board of Health, and then a right of review in the courts, so that no physician can now be shorn of his license without a court review if he so desires. We shall not discuss the mooted question as to whether or not the license is a privilege or a property right. It suffices to say that this court has denominated it to be a valuable right of which the possessor can not be deprived except by due process of law. The question then is, does this sec. 7336, supra, afford the physician due process of law? It has been contended that the statute did not authorize the taking of depositions. This contention the court in banc overruled in the case of State ex rel. Farber, vs. Shot et al. decided at this term, but not yet reported. That case rules that either party can take and make proof by way of depositions. That situation must be considered in determining the effectiveness of the statute as a statute giving to the parties due

process of law. That case ruled that the statute permitted the taking of evidence by deposition of all witnesses who would not voluntarily appear at the hearing. The statute therefore guarantees a hearing [fol. 78] by way of depositions, at the least. This hearing is before a board in the first instance, but a court review is provided for, and these cases have, under the scheme of this statute, run the gamut from the State Board of Health to this court. This case exemplifies this fact. If the hearing fulfills the requirements of due process, then no constitutional inhibitions have been countered. Due process of law requires a hearing, after due notice of such hearing has been given the party. The proceedings need not be "according to the course of the common law." Hennig vs. Staed, 138 Mo. l. c. 435. The law in question provides for a hearing upon evidence, after due notice, and for a judgment after such hearing. Not only so, but it provides for a court review of the whole proceeding, and this relator had such hearing in the circuit court, and is now in this court upon appeal. By "due process" we do not always mean a court hearing. "But neither proceedings according to common law, nor judicial proceedings in a formal court for the trial of actions, are essential to due process." McGehee's Due Process of law, p. 52; 6 R. C. L. p. 459 sec. 454. There must, however be a hearing after due notice, and opportunity to defend the right involved, before a legally constituted body for determining such right of the citizen. The statute under consideration not only grants all these things, but to make the matter doubly sure, it provides for a court review.

The most commonly approved definition of due process is that given by Webster in the course of his argument in the Dartmouth College Case (4 Wheat. (U. S.) 418) wherein he said:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgement only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."

Our court has often quoted with approval this statement, and an- [fol. 79] nounced it as a definition, apply it to varying facts and cases. Clark vs. Mitchell 64 Mo. l. c. 578; Hunt vs. Searcy, 167 Mo. l. c. 179; Barber Asphalt Pav. Co. vs. Ridge 169 Mo l. c. 394; Wilcox vs. Phillips, 260 Mo. l. c. 679.

The foregoing cases discuss from different angles the doctrine of due process, both under the State and Federal constitution, and baring the question of requiring the evidence by deposition, rather than the enforced attendance of witnesses there is nothing in the law denying due process. The question of evidence by deposition we consider later.

IV

Does this sec. 7336, R. S. 1919, do violence to the due process clause of the constitutions (State and Federal) because it provides

for the evidence to be submitted by dposition, rather than by the personal attendance of witnesses. The general rule is that the state legislature has the right to prescribe rules of evidence and rules of procedure. Such rules and laws must be reasonable, and give to the party an opportunity to make a defense, for if they preclude a full defense, they would violate due process. McGehee on Due Process of Law, p. 80: 12 C. J. p. 1233.

More pointed is the ruling in L. C. R. R. Co. vs. Paducah Brewers Co. 157 Ky. L. c. 364. In that state there was a statute which allowed a railroad commission to hear evidence and make an award in matters of dispute, as to rates charged, and other things, between the railroads and their customers. The statute also provided that if the award made was not complied with by the railroad it should be certified to the circuit court, when the defendant company should be brought in by notice, and the case there heard upon the evidence taken before the commission. It was urged that this latter provision as to the evidence to be used violated the due process clauses of the constitutions. The court at page 364 said:

"Appellant further argues that section 829 so construed violates the Due Process and Equal Protection clauses of the Fourteenth [fol. 80] Amendment of the Constitution of the United States, because of the provision restricting the evidence to be introduced in the circuit court, to that produced before the Commission. This was a wise provision of law, its purpose being to prevent either party from trying half its case before the Commission, and the other half in the circuit court, upon testimony not offered before the Commission. It merely relates to and controls the practice in such cases. There is no denial of equal protection of the law. The carrier has the right to offer its evidence; and if the Commission's action is contrary to law, upon the competent evidence so offered, the courts will nullify said action."

In State of Washington v. Fairchild, 224 U. S., 510, the Supreme Court of the United States held that a statute of the State of Washington confining the evidence upon a judicial review of an order of the State Railroad Commission to that heard by the Commission, was not violative of the Fourteenth Amendment. Appellant attempts to distinguish that case from the case at bar, because the order or award there in question was not an award for reparation; but we are unable to discover any distinction in the principle involved, i. e., the right of the State to control procedure in its courts, and to require the carrier to produce its evidence to the Commission by restricting the evidence to be heard by the court to that presented to the Commission.

Appellant's contention in this respect may also be answered in the opening words of the opinion by Mr. Justice White in L. & N. R. R. Co. v. Schmidt, 177 U. S. 230:

"It is no longer open to contention that the due process clause of the Fourteenth Amendment does not control mere forms of procedure in State courts, or regulate the procedure therein. All its require-

ments are complied with, provided in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend."

[fol. 81] The court, therefore, holds that section 829 empowers the Railroad Commission to order restitution by a carrier to a shipper of the amount of money charged and collected by it from the shipper in excess of a reasonable rate thereafter fixed by the Commission, subject only to the statute of limitations that neither, as empowering the Commission to make such an award, nor as to the methods of procedure therein prescribed, does said section violate the Constitution of the State of Kentucky; nor is it in contravention of the Constitution of the United States." The cases cited sustain the views of the Kentucky court.

From a full consideration of the law, we are of the opinion that the statute (sec. 7336, supra) gives to physicians ample means of making a full defense to charges filed against them before the State Board of Health, and is not therefore violative of due process constitutional provisions.

V

The foregoing dispose of the only serious questions in this case. There was ample evidence from which the State Board of Health could find that relator was guilty of the charges preferred. He was not entitled to subpœnas, and the board could not issue such. He could have introduced his evidence, if any he had, by way of deposition. In this way he could have had compulsory process for witnesses. The officer taking the depositions could compel attendance, and compel the giving of testimony. Relator made no effort to secure such evidence (if such he could procure) in the method given him by statute. He testified personally, and had the benefit of his own evidence, and could have had the benefit of other evidence if he had taken depositions. His conduct showed no diligence in getting ready for the hearing, and no error was committed in refusing either application for continuance. As to the oral application for continuance, it should be added that there is no substantial reason for postponing a proceeding like this, until after the criminal prosecution is concluded. In our judgment the relator had a fair disposition of [fol. 82] his case, and has reaped a just reward for this conduct. The judgment of the circuit court is affirmed. All concur.

W. W. Graves, J.

[fol. 83] IN SUPREME COURT OF MISSOURI

[Title omitted]

PETITION FOR REHEARING—Filed June 18, 1924

Now at this day comes the above named appellant, by his attorneys, Owen & Davis, and moves the court to grant him a rehearing of the above entitled cause, for the following reasons, viz:

(1)

Because the court erred in holding that section 7336, R. S. 1919, was not in contravention of section 30 of Article 2 of the Constitution of Missouri and section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2)

Because the court erred in holding that the order or judgment of the Board of Health revoking and suspending the license of appellant to practice medicine and surgery did not deprive him of his said license within the meaning of the due process of law clause of the Constitution of Missouri and of the Fourteenth Amendment.

(3)

Because the court overlooked the opinion of the court in banc in the case of State ex rel. Seidner v. Bruer, judge of the circuit court of Franklin county, handed down since this case was argued.

(4)

Because the opinion of the court is in direct conflict with all that [fol. 84] part of section 7336, R. S. 1919, reading as follows: "Testimony may be taken by deposition, to be used in evidence on the trial of such charges before the board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases."

(5)

Because the court erred in holding that Roy Coyne, either as prosecuting attorney or as a private citizen, had the right, authority and power under section 7336 R. S. 1919, to file charges against appellant.

(6)

Because the court erred in holding that section 7336 R. S. 1919, does not grant by implication power and authority to the State Board of Health to issue compulsory process for witnesses at and upon the request of appellant.

(7)

Because paragraph I of the opininon is, on principle, in conflict with paragraph 2 of the opinion, in that said paragraph I holds that section 7336, R. S. 1919, grants by implication authority to any citizen to file charges, and that said section does not grant by implication authority to the Board of Health to issue compulsory process for witnesses.

Owen & Davis, Attorneys for Appellant.

[fol. 85] IN SUPREME COURT OF MISSOURI

[Title omitted]

BRIEF IN SUPPORT OF MOTION FOR REHEARING—Filed June 18, 1924

Counsel for appellant are so thoroughly convinced that the able opinion of the court is in conflict with so many other decisions of the court on analagous questions and that the logic of paragraph 1 is in conflict — the ruling of the court in paragraph 2, that we earnestly urge the court not to adhere too strictly to Rule 21, and to re-examine the propositions presented for decision by the record.

Owing to the importance of the decision to the appellant, we feel that we would be derelict in our duties, if we did not urge upon the court a re-examination of the questions presented by his appeal.

It is held in the first paragraph of the opinion that section 7336, R. S. 1919, authorized and empowered Roy Coyne, as a private citizen to file the complaint against appellant to have his license revoked, but that the general law did not so authorize him as prosecuting attorney.

The court in holding that he had the authority and power to file said complaint under said section, necessarily held that said section, by implication, granted the power and authority, as it contains no express grant of such authority. Implied grants of power or authority only follow as an incident to express and specific grants of power or authority, and as section 7336 does expressly grant to any citizen any power *of* authority whatever in the matter of the revoking of licenses of physicians, the complaint of Roy Coyne was without authority of law whether he acted as prosecuting attorney or as a private citizen.

If said section grants, by implication, the right, authority or power to any citizen to file complaints against physicians to revoke licenses, why does it not grant by implication the power or authority to the [fol. 86] board to issue process for witnesses, etc.

What is the difference in principle between the two propositions? It is true that said section provides that depositions may be taken and used in evidence at the trial, but it is also true that said section does not — that the evidence to be produced before the board shall be by deposition.

Does the provision for the taking of depositions exclude the authority to issue process for witnesses? If such was the intention of the legislature, the right to take depositions to be used on the trial of the case would have been limited to the "same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases."

It may be true, as stated by the court, that "many sessions of the Legislature have come and gone" since the opinion in Goodier case; but that should be of no consequence and the court should not feel bound to follow the Goodier case, as it was seriously questioned, if not overruled, in State ex rel. Spriggs v. Robinson et al., 253 Mo. 271, and in State ex rel. Johnson v. Clark, et al., 288 Mo. 659, and in view

of the judgment of the court in the recent case of State ex rel. Seidner, circuit attorney, v. Bruer, Judge of the Franklin circuit court.

Section 9, chapter 207, Gen. St. 1865, now section 3697, R. S. 1919, has come down to us without as much as the dotting of an "i" or the crossing of a "t."

The Legislature during the early seventies was in session annually and since then every two years.

The many sessions of the Legislature held since 1969 were no doubt familiar with and satisfied with the construction placed upon said statute by this court in the following cases, to wit: Ex Parte Myers, 44 Mo. 299 (decided in 1869); State v. Jolly, 96 Mo. 435 (decided in 1888); and State v. Buck, 120 Mo. 479 (decided in 1893), and perhaps other cases.

This court, according to the public press, as we read, in the recent [fol. 87] case of State ex rel. Seidner, circuit attorney, against Bruer, circuit court judge, after much thought and argument, overruled all of the above cases, the first of which had been the law of the state for fifty-five years.

What reason is there for adhering to the Goodier case after the overturning of the above cases? If a wrong construction was placed upon the statute of 1865 in the above cases, the court was right in overruling them, as no vested rights could have intervened during the interval.

If the court in the Goodier case placed a wrong construction upon section 7336, R. S. 1919, it should not now hesitate to overrule it.

If we remember correctly this court a short time ago affirmed a decision of the Springfield Court of Appeals overruling all of the cases in this state holding that it was mandatory upon the appellate courts to reverse verdicts of conviction in criminal cases, if the record did not show an arraignment and plea of not guilty.

If said section 7336 does not grant, by implication, the power or authority to the Board of Health to issue process for witnesses, etc., on behalf of and at the request of the party against whom charges have been filed, then it cannot with reason be held that said section affords the party so charged with due process of law.

All of the courts, including this Honorable court, in defining the term "due process of law" hold it to mean reasonable notice and reasonable opportunity to controvert by proof every material fact which bears on the question under investigation.

If the right of reasonable notice and of reasonable opportunity to controvert by proof every material fact which bears on the question under investigation, does not also include the right to demand and have compulsory process for witnesses, etc., then pray what does this court mean by the use of such language?

If the right to be present at the trial or investigation by the board of charges preferred and the right to controvert by proof every material fact which bears on the right or matter under investigation, does not include process for witnesses, etc., then all such rights are barren [fol. 88] rights.

The right to be present before a court of law or of equity which pronounces judgment upon the question of life, liberty, property,

rights and privileges, and the right to be heard and to controvert by proof every material fact bearing on the question under investigation, is conceded by all. But in courts of law and equity the right to process for witnesses is a part of due process of law.

The due process of law clause of our State Constitution and of the Fourteenth Amendment to the Constitution of the United States not only extends and applies to courts of law and equity, but to every governmental proceeding which may interfere with personal or property rights, whether the proceedings be legislative, judicial, administrative or executive.

Ekern v. McGovern, 46 L. R. A. (N. S.) 796; 166 U. S., 226; 210 U. S., 373.

12 Corpus Juris, sec. 961, pages 1195-6.

But it is held in the opinion that section 7336 provides that the evidence shall be submitted by deposition, rather than by the personal — of the witnesses and giving their testimony from the witness stand before the board, and that the right to take depositions extended to witnesses living at the place of trial, and that therefore appellant was afforded due process of law.

The witnesses whose names were furnished the board in connection with request for subpœna lived at the place of trial.

It is true that the above section provides that the testimony of witnesses may be taken by deposition, but it also provides under what circumstances such depositions may be read in evidence at the trial.

All that part of section 7336 relating to the taking of depositions reads, as follows:

"Testimony may be taken by deposition, to be used in evidence on the trial of the charges before the board in the *same manner and under the same rule and practice as is now provided* for the taking of depositions in civil cases." (Underscoring ours.)

Section 5467, R. S. 1919, prescribes the rule and practice for the [fol. 89] reading of depositions taken in civil cases.

Depositions taken in civil cases can be read in evidence in and under the following circumstances, viz: (1) If the witness reside or is gone out of the State; (2) if he be dead; (3) if by reason of old age or bodily infirmity he be unable to or cannot attend court; (4) if he reside in a county other than in which the trial is had, or if he be gone to a great distance than forty miles from the place of trial; (5) if he be a judge of a court, a practicing attorney or physician.

We do not believe it can be logically contended that the clause "in the same manner and under the same rule and practice as is now provided for the taking of depositions in civil cases" the taking only and not the use in evidence of such depositions on the trial of charges.

It was contended in Wilson v. Burney, 193 Mo. App. 326, and in Ex parte Livingston, 12 Mo. App. 80, that the word "conditional" in section 5440, R. S. 1919, modified and limited only the taking of the deposition and not the reading in evidence of such deposition, but the court held otherwise.

If the Legislature did not intend to limited the reading of depositions in evidence on the trial of charges in the same manner and under the same rule and practice as in civil cases, it would have been so easy to have provided that "testimony may be taken by depositions in the same manner and under the same rule and practice as is now provided for the taking of depositions in civil cases, and such depositions when so taken may be read in evidence on the trial of such charges before the board," or language of like import.

If section 7336 limits the right of a party charged and tried before said board to controvert every material fact placed in evidence by the prosecution by the testimony of such witnesses as may be willing to appear voluntarily and testify, and by the deposition of witnesses, as held by the court, then said section does not afford the party so charged and put upon trial thereunder with due process of law, for the reason that the party so charged and put upon trial could not [fol. 90] under the vary nature of things be prepared to meet unexpected evidence on the part of the prosecution, by the issuance and service of a subpœna returnable instanter, as is done every day in the trial of cases in courts of law and equity.

Many a case is won and lost be the testimony of witnesses brought in under a subpœna returnable instanter, which testimony could not be had if it had to be secured by deposition.

Furthermore, the prosecution or defense of a party or a cause can not be as effective and complete when tried upon depositions as upon the testimony of witnesses who appear and testify in person before the court or board as the case may be.

The fact that this case has under the scheme of the statute "run the gamut from the State Board of Health to this court" does not within itself constitute due process of law. The right to review the proceedings is by certiorari, which brings up the record made by the board of health for review. If the statute had provided for a trial de novo in the circuit court, as is done in some of the states in proceedings before boards and commissions, due process of law would have been afforded appellant, regardless of the character of the evidence and proceedings of the board.

We know of no case, except the Goodier case, which holds that just any kind of a hearing or trial before a board or commission, such as the Missouri State Board of Health, is due process of law regardless of the right of trial de novo in a court of law or equity.

It appears from the statement of facts accompanying the opinion of the court in the case of the State of Washington v. ——, 224 U. S. 510, that the statute under which the Railroad Commission of that state exercised its powers expressly provided for the issuance of subpœnas for witnesses, etc., thereby guaranteeing to the party to be affected by the order of the Commission the right to contest by testimony of witnesses upon the stand before said Commission every material fact presented for decision.

Our contention, we think, is supported by the following quotation in the opinion, from Railroad Co. v. Schmidt, 177 U. S. 230, viz:

[fol. 91] "It is no longer open to contention that the due process clause of the Fourteenth Amendment does not control the mere forms of procedure in the state courts, or regulate the procedure therein. All its requisites are complied with, *provided in the proceedings in which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend.*" (Underscoring ours.)

It is not questioned that the Legislature has the right to prescribe rules of evidence and procedure, but such rules and laws must be reasonable, and give the party an opportunity to make a defense, for if they preclude a full defense, they would violate due process.

McGee on Due Process of Law, 80.

But if section 7336 does not authorize the taking of the depositions of witnesses who live at the place of trial, it does not afford due process. On the other hand, if it does so authorize, it does not afford due process, as we have attempted to show above.

Owen & Davis, Attorneys for Appellant.

[fol. 92] IN SUPREME COURT OF MISSOURI

[Title omitted]

MOTION TO TRANSFER CAUSE TO COURT IN BANC—Filed June 18, 1924

Now at this day comes the above named appellant, by his attorneys Owen & Davis, and states and shows to the court that the record in this cause shows that the judgment or order of the Board of Health, suspending and revoking the license of appellant to practice medicine was rendered without due process of law within the meaning of the due process of law clause of the Fourteenth Amendment, for the reason that the Board of Health refused, upon request and demand therefor by appellant, to issue subpoenas for certain witnesses living at the place of trial and who did not voluntarily appear and testify at the trial before said board.

Appellant further states that the record in this cause shows that appellant contended at the trial or hearing before said board that section 7336, R. S. 1919, was in conflict with the due process of law clause of the Fourteenth Amendment, and that he so contended in the trial of this cause in the circuit court, and that he so contended upon brief and upon oral argument of this cause in this court.

Wherefore appellant states that, by reason of the facts aforesaid, a federal question is presented for decision by this court within the meaning of section 4 of Article 6 of the amendment of 1890 to the Constitution of Missouri, and appellant therefore prays the court to transfer this cause to the Court in Banc.

Owen & Davis, Attorneys for Appellant.

[fol. 93] IN SUPREME COURT OF MISSOURI. IN BANC

[Title omitted]

BRIEF IN OPPOSITION TO MOTION FOR REHEARING AND MOTION TO TRANSFER TO COURT IN BANC — Filed June 20, 1924

Appellant has wholly failed to point out to the Court any question decisive of this case which has been duly submitted by counsel and overlooked by the Court, or any decision which is in conflict with an express statute or with a controlling decision to which the attention of the Court was not called through inadvertence of counsel.

Appellant's argument in support of his motion for rehearing advances nothing new but is a restatement of his argument presented both orally and by brief at the original hearing.

[fol. 94] The matter chiefly complained of in his motion for rehearing, viz., that of due process of law, has been passed upon by the Court In Banc in the case of State ex rel. Farber vs. Shot, decided on the 26th day of May, 1924.

The Court held unanimously in that case that the Board was given no power to issue compulsory process but that the means provided for securing testimony by either party by way of depositions was valid, and sufficiently enabled either party to secure such testimony as they had from witnesses who refused to attend voluntarily and testify before the Board.

Appellant contends that there is a conflict between paragraphs 1 and 2 of the decision in the case at bar.

He argues that the Court held in paragraph 1, necessarily by implication, that the Prosecuting Attorney as a private citizen could file a complaint with the Board, as there is no express provision in the statute to that effect. Respondents concede, for the purpose of this discussion, that such authority is found therein by implication alone.

Appellant applies the same reasoning to the ruling of the Court in paragraph 2, wherein the Court held that the Board has no power to issue compulsory process, and argues that the implication in respect to the authority of any individual for filing complaint is no greater or stronger than the implied power in respect to issuance of compulsory process.

Respondents point to the rule that whatever is necessarily or plainly implied in a statute is as much a part of it as that which is expressed (36 Cyc. 1113). There is no escape from the conclusion that Section 7336, implies that complaints or charges filed before the Board against physicians must be in writing and an exact statement or copy thereof served upon the accused. The statute contains no provision [fol. 95] relating to filing of such complaint that indicates a legislative intent that a different method be pursued. Not so with reference to taking testimony. No express provision is made for compulsory process and such power might be invoked by implication but for the provision therein relating to depositions. The maxim "expressio unius est exclusio alterius" is applicable here. Where the statute

directs the performance of certain things in a particular manner it forbids by implication every other manner of performance (36 Cyc. 1122).

Respondents contend that appellant has failed to show the Court wherein it has failed in any particular to consider carefully and fully any question decisive of the case which has been overlooked by the Court, or that the decision in this case is in conflict with any other decision or express statute.

Therefore, the motion for rehearing and the motion to transfer to Court In Banc should each be overruled.

Respectfully submitted, Jesse W. Barrett, Attorney General; J. Henry Carruthers, Assistant Attorney General, for respondents.

[fol. 96] In Supreme Court of Missouri, Division No. 1

[Title omitted]

Order Overruling Petition for Rehearing and Motion to Transfer Cause to Court in Banc

Now at this day, the Court having considered and fully understood the motion for a rehearing herein and motion to transfer this cause to Court in Banc, heretofore filed herein by the said appellant, doth order that the said motions, and each of them, be, and the same are hereby overruled.

[fol. 97] In Supreme Court of Missouri

[Title omitted]

Petition for Writ of Error—Filed Oct. 16, 1924

To the Hon. W. W. Graves, Chief Justice of the Supreme Court of Missouri:

And now at this date comes your petitioner, plaintiff in error in the above entitled cause, and states that on the 13th day of March, 1923, Emmett P. North, Franklin E. Murphy, Cortez F. Enlow, E. E. Bruner, T. A. Son and R. S. Vitt, the above named defendants in error, were members of and constitute the Missouri State Board of Health.

That on the said 13th day of March, 1923, Roy Coyne was the duly elected, qualified and acting prosecuting attorney of Jasper County, Missouri.

That the powers, authority and duties of the prosecuting attorneys of the state of Missouri, prescribed, fixed and governed by section 736 of the Revised Statutes of Missouri for the year 1919, which said section reads as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal cases in their respective counties in which the county or state may be a party", etc.

That said Roy Coyne, prosecuting attorney aforesaid on the 13th day [fol. 98] of March, 1923, filed with the Missouri State Board of Health, his petition or complaint seeking to have revoked the license heretofore issued to your peitioner by the proper authority of the state of Missouri, authorizing him to practice medicine and surgery in the state of Missouri.

That it is alleged and charged in said petition or complaint that your petitioner was guilty of unprofessional and dishonorable conduct, in this, to-wit: that on or about the 1st day of May, 1922, he unlawfully produced a criminal abortion upon Almeda Stewart, a pregnant woman, not then and there intending necessary surgical or medical treatment, etc.

That upon the filing of said petitioner or complaint said Board of Health issued a citation against your petitioner commanding him to be and appear before said Board on the 6th day of April, 1923, at the Connor Hotel, in Joplin, Jasper County, Missouri, to answer the charge contained in said petition or complaint, and show cause why his license should not be revoked, which citation was duly served upon petitioner within the time provided by law.

That a trial was had before said Board of Health on April 6, 1923, which resulted in the order, decree or judgment made and entered by said Board, suspending or revoking the license of petitioner for a period of fifteen (15) years.

That said complaint or petition was filed and said trial was had under the terms and provisions of Section 7336, Revised Statutes of Missouri, 1919, which reads, as follows:

"The board may refuse to license individuals of bad moral character, or persons guilty of bad moral character, or persons guilty of unprofessional conduct, and they may revoke licenses, * * *, for like causes. * * *. Habitual drunkenness, drug habit or excessive use of narcotics, or producing criminal abortion, * * *, shall be deemed unprofessional and dishonorable conduct within the [fol. 99] meaning of this section. At least twenty days prior to the date set for any such hearing before the board for the revocation of such license, the secretary of the board shall cause written notice to be personally served upon the defendant in the same manner prescribed for the serving of original writs in civil actions. Said notice shall contain an exact statement of the charges and the date and place set for the hearing before the board. If the licentiate appear either in person or by attorney, the board shall proceed with the hearing as herein provided.

The board may receive and consider depositions and oral statements and cause stenographic reports of the oral testimony to be taken and transcribed, which, together with all other papers pertaining thereto, shall be preserved for two years. If a majority of the board are satisfied that the licentiate is guilty of any of the offenses charged, the license may be revoked for such period of

time as may be agreed upon. Any person whose license has been or shall be revoked by the board shall have the right to have the proceedings of said board revoking his license and all of the evidence therein reviewed, on a writ of certiorari, by the circuit court of the county in which said board held its session when said license was revoked. Said writ shall issue upon the petition of the person whose license shall have been revoked, to said court or to the clerk thereof in vacation at any time within ninety days after such revocation, and shall command the said board and the secretary thereof to certify to said court the record and proceedings of said board, and a complete transcript thereof, and of all of the evidence therein pertaining to the revocation of said license. The petitioner for the writ of certiorari shall set forth the rights of petitioner and the injuries complained of by him and shall be verified by him. If the proceedings of the board shall be sustained or upheld by the circuit court, its orders, decisions or judgments revoking said license shall remain and continue in full force and effect. And any such license so revoked by the board, pending said review on certiorari, stand revoked and so remain until the proceedings of the board relating thereto shall be quashed or otherwise annulled by the circuit court on said writ of certiorari. Testimony may be taken by deposition, to be used in the evidence on the trial of such charges before the board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases."

Your petitioner further states that no statute gives or grants to prosecuting attorneys or other state officers, or to any private citizen, the right, power or authority to make and file complaints or charges against physicians and surgeons to revoke the licenses of such [fol. 100] physicians and surgeons unless it be held that said section 7336 gives and grants such right, power or authority by implication.

Your petitioner further states that before the trial of said complaint by said board, he demanded of the secretary thereof, Doctor Enlow, a subpœna for Doctor Benton, of Newton County, Missouri, and a subpœna for Doctor Clark and for Doctor Hoshaw, residents of Joplin, Jasper County, Missouri, and a subpœna duces tecum for James Jackson, of Joplin, Missouri, commanding him to have and produce at the trial of said complaint, a certain prescription written by a Doctor James for said Almeda Stewart, which prescription was filled by the Jackson Drug Company, which is owned and conducted by said James Jackson. This request was refused and your petitioner was forced to go to trial before said Board of Health, without the testimony of said witnesses, and without said prescription.

Your petitioner further states that before a trial of said complaint by said board, he filed his motion to quash said complaint and dismiss the proceedings for the reason that said board was without jurisdiction to hear and try the charge complained of in said complaint or petition so filed as aforesaid by said Roy Coyne—said complaint having been filed without authority of law, and for the reason that said section 7336 was void, in that it did not authorize or empower said board to issue subpœnas or other compulsory process for

witnesses and for the production of papers and documents to be used in evidence upon trials had under said section; and for the further reason that said section 7336 was in controvention of the Fourteenth amendment to the Constitution of the United States, in that it [fol. 101] authorized and empowered said board to revoke the license of your petitioner without due process of law, and that said section did not afford equal protection of the laws.

Your /etitioner further states that on the 9th day of April, 1923, and within 3 days after the trial had before said board, he filed in Division No. 1 of the circuit court of Jasper County, and in open court, his petition praying that a writ of certiorari be issued against the above named defendants in error, commanding them and each of them to certify to said court, a true, full and complete copy of the complaint filed by Roy Coyne as aforesaid, together with a true, full and complete copy of all acts and proceedings of said board including the evidence taken upon the trial of said complaint.

Said writ was duly issued and due time served upon defendants in error, who made return thereto by certifying to said circuit court a true, full and complete copy of said complaint, together with a true, full and complete copy of said complaint, together with a true, full and complete transcript of all motions filed, the rulings thereon, the evidence taken, the order, decree or judgment of said board, in fact, all of the proceedings had before said board.

Upon the filing of said return, your petitioner filed his motion to quash the record of the proceedings had before said board, and to quash the order, decree and judgment of said board, revoking the license of your petitioner, on the grounds that the petition or complaint under which petitioner was tried and convicted was filed without authority of law, and that said board was therefore without jurisdiction; and that said section 7336 was void, in that it did not authorize or empower the issuance of subpœnas or other compulsory [fol. 102] process for witnesses, papers and documents necessary to the defense of your petitioner, and that said section was in controvention of the Fourteenth Amendment to the Constitution of the United States, in that said section authorized and empowered said board to revoke the license of petitioner without due process of law, and for the further reason that said board refused, upon request therefor, to issue subpœnas for Dr. Benton, Dr. Clark and Dr. Hoshaw, and subpœna duces tecum for James Jackson. This motion was, by the court overruled, and the order, decree or judgment of the board was thereupon affirmed by said circuit court.

That your petitioner contended upon appeal to the Supreme Court that the order, decree or judgment of suspension or revocation was illegal for the reason that the board was without jurisdiction to hear and determine the said charge as the complaint was filed without authority of law.

It was also contended, on assignment of error, in the Supreme court that said section 7336 impliedly authorized the issuance of said subpœnas for said witnesses, and that the refusal of said board to issue said subpœnas and the forcing of him to trial before said board without his witnesses, and without said prescription, and that

the order, decree or judgment of said board, deprived him of his license to practice medicine and surgery without due process of law in controvention of said Fourteenth Amendment.

Petitioner also contended, upon assignment of error, in the Supreme Court, that if said section 7336 *did* not impliedly authorized and empowered said board to issue compulsory process for witnesses and for the production of documents and papers to be used in the [fol. 103] trial of charges or complaints against physicians and surgeons, that said section was in controvention of said Fourteenth Amendment, and therefore invalid.

It was also contended by petitioner, upon assignment of error in the Supreme Court, that said section 7336 was void and uninforcible for the reason that it did not provide or authorize any one to file complaints, petitions or charges against physicians and surgeons to revoke their licenses, and for the reason that it did not afford or provide the necessary machinery for the orderly, fair, impartial and full investigation of complaints or charges filed thereunder. That said section was, therefore, in controvention of said Fourteenth Amendment.

Your petitioner further states that the Supreme Court, on appeal in said cause, by its opinion, duly promulgated and handed down, held that Roy Coyne, as an individual, had the power and authority to file said complaint, and that the board therefore had the purisdiction to hear, try and determine the charge contained in said complaint. The court, under this ruling or holding, necessarily held that petitioner was not deprived of his license to practice medicine and surgery without due process of law, and that he was not deprived of any right, privilege or immunity guaranteed by said Fourteenth Amendment, and that he was not denied equal protection of the laws as guaranteed by said Amendment.

The Supreme Court also held, in its opinion in said case, that said section 7336 did not give or grant to said board the authority or power to issue compulsory process for witnesses or for the production of documents and papers to be used in the trial of cases [fol. 104] before it, and that said section afforded petitioner due process of law and that said section was not in controvention of the Fourteenth Amendment.

The Supreme Court also held, in its opinion filed in said case, that your petitioner in the presentation of his defense before said board, to the charge against him, and for which he was tried and convicted, was confined to depositions taken and filed in said cause, and that the method of procedure provided in said section 7336, afforded your petitioner due process of law within the intent and meaning of said Fourteenth Amendment, and that petitioner was not deprived by said section, and by the judgment, decree or order of suspension, of any right, privilege or immunity guaranteed by said Amendment.

Your petitioner further states that section 5467 R. S. 1919, prescribes the rule and practice for the taking and reading of depositions in civil cases, and that it provides that depositions taken in civil cases may be read in evidence on the trial of such cases, under the

following circumstances, and no other, namely: (1) If the witness reside or is gone out of the state; (2) If he be dead; (3) If by reason of old age or bodily infirmity he be unable to, or cannot attend court; (4) if he reside in a county other then in which the trial is had, or if he be gone to a greater distance than forty miles from place of trial; (5) If he be judge of the court, or practicing attorney, or physician.

The record in this case shows that Dr. Clark, Dr. Hoshaw and James Jaskson lived, at the time of the trial before the board, in Joplin, Missouri, the place of trial.

[fol. 105] That, upon the handing down of the opinion of the court affirming the judgment of the circuit court, petitioner filed his motion for a rehearing in said cause, in which it is alleged that the court erred in holding that section 7336 was not in contravention of section 1 of the Fourteenth Amendment, and that the court erred in holding that the order or judgment of the board of health suspending and revoking the license of your petitioner did not deprive him of his said license within the meaning of the due process clause of the Constitution of Missouri and of the Fourteenth Amendment. This motion or petition was overruled by the court on July 31, 1924, at which time the judgment of the Supreme Court became final.

Your petitioner also filed motion to transfer the appeal from Division No. 1 of the Supreme Court to the Court In Banc, as provided in the Constitution of Missouri, on the ground that the record in the case raised a Federal question within the meaning of the Constitution of Missouri. This motion was also overruled on July 31st., 1924.

Your petitioner further states that the force and effect of the order or judgment revoking his license by the board of health, the affirmance of this order or judgment by the circuit court, on certiorari, and the affirmance of the judgment of the circuit court on appeal by the Supreme Court of Missouri, is to deprive your petitioner of his license without due process of law as provided in the Fourteenth Amendment to the Constitution of the United States, and said judgments and each of them denies to petitioner the equal protection of the laws, as guaranteed by said Fourteenth Amendment.

[fol. 106] Your petitioner further avers that each of the motions referred to hereinbefore raises a federal question, as will appear from the opinions of the court in the following cases, to-wit:

Ireland v. Woods, 246 U. S. 323.
Phil. & Read. C. & I. Co. v. Gilbert, 245 U. S. 162.
Union Line Co. v. Chicago & N. W. R. R. Co., 233 U. S. 211.
Scudder v. New York, 175 U. S. 32.
Columbia Water Co. v. St. Car Co., 172 U. S. 475.
Miller v. —— ——, 168 U. S. 131.
Leroy v. Superior Court, 167 U. S. 175.
Spencer v. Merchant, 125 U. S. 345.
Abbott v. Nat. Bank of Comm., 175 U. S. 409.
Keerl v. Montana, 213 U. S. 135.
C. B. & Q. R. R., 166 U. S. 266.

Huntington v. Attrill, 146 U. S. 657.
Old Wayne Life Ass'n v. McDonough, 204 U. S. 8.
Fayerweather v. Ritch, 195 U. S. 276.
O'Neal v. Leaner, 239 U. S. 244.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States be allowed; that citation be granted and signed; that the bond herewith presented be approved, and upon compliance with the terms of the statute in such cases made and provided, said bond and writ of error may operate a supersede-s; that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of the Supreme Court of the State of Missouri, the highest Appellate [fol. 107] Court in the state of Missouri, be reversed.

Dated this 16th day of October, A. D. 1924.

State of Missouri at the Relation of Leon Hurwitz, Petitioner, by I. V. McPherson, R. H. Davis, and N. J. Cierce, Attorneys.

[fol. 107½] [File endorsement omitted.]

[fol. 108] IN SUPREME COURT OF MISSOURI

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Oct. 16, 1924

The State of Missouri at the relation of Leon Hurwitz, in connection with petition for writ of error herein, makes the following assignment of errors which the State of Missouri at the relation of Leon Hurwitz avers occurred in the final order and judgment herein, dated July 31st, 1924, the date on which motion for rehearing was denied and overruled by the Supreme Court of Missouri, as follows, to wit:

(1)

The Supreme Court of the State of Missouri erred in holding that Roy Coyne, as a private citizen, had the power and authority under the law to file the petition or complaint under which petitioner and plaintiff in error was tried and convicted by the Missouri State Board of Health and his license to practice medicine and surgery revoked or suspended, and that said board had jurisdiction to hear, try and determine the charge contained in said petition or complaint. In so holding the court necessarily held that petitioner and plaintiff in error was afforded due process of law and that he was not denied the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(2)

The Supreme Court of Missouri erred in the construction which it placed upon section 7336, Revised Statutes of Missouri, 1919, to the effect that said section did not authorize or empower said Board of Health to issue compulsory process for witnesses and for the [fol. 109] producement of documents and papers to be used in evidence upon trials of complaints filed with said Board, and the judgment of affirmance, entered in the circuit court affirming the order, decree and judgment of said Board, did not deprive petitioner and plaintiff in error of his license to practice medicine without due process of law in contravention of said Fourteenth Amendment.

(3)

If said section 7336 impliedly authorized and empowered the Board to issue compulsory processes for witnesses and for the production of documents and papers to be used in evidence upon trial of the charge contained in said complaint against petitioner, as contended by petitioner and plaintiff in error in the circuit court and also in the Supreme Court, then the denial of the application of petitioner and plaintiff in error for subpœnas for certain witnesses and for certain documents, and the forcing him to trial without the testimony of said witness and without the benefit of said document, denied and deprived him of the equal protection of the laws and deprived him of his property, to wit, his license to practice medicine, without due process of law in violation of said Fourteenth Amendment, and the Supreme Court erred in not so holding and adjudging.

(4)

The holding of the Supreme Court that said section 7336 was a valid and enforceable statute and that the trial had thereunder did not deprive petitioner and plaintiff in error of his license to practice medicine and surgery without due process of law in contravention of the Fourteenth Amendment, is erroneous, for the reason that said section does not authorize or empower any one to file complaints against physicians to revoke their licenses to practice medicine, and for the reason that it does not afford the necessary machinery for an orderly, fair, impartial and full investigation of charges that may be filed thereunder.

[fol. 109a]

(5)

The Supreme Court erred in holding and adjudging that petitioner and plaintiff in error, in defending the charge contained in said complaint filed against him by Roy Coyne, was confined to depositions taken and filed in the case and to the evidence of such witnesses as might voluntarily appear and testify in his behalf, and that said section 7336 afforded petitioner and plaintiff in error with due process of law, and the order, decree and judgment of said Board of Health did not deprive him of his license without due process of

law and that it did not deny to petitioner and plaintiff in error the equal protection of the laws as provided in the Fourteenth Amendment.

(6)

The Supreme Court erred in not holding and adjudging section 7336 void and that it did not afford petitioner due process of law and that it denied to petitioner the equal protection of the laws as guaranteed by the Fourteenth Amendment, and in not holding the order, decree and judgment of the Board of Health deprived petitioner of his license to practice medicine and surgery without due process of law and that it denied to him the equal protection of the laws as guaranteed by said amendment.

(7)

The Supreme Court erred in affirming the order and judgment of the Circuit Court affirming the order, decree and judgment of the Board of Health, for the reason that since the Board of Health did not have jurisdiction of the subject matter of the complaint under which petitioner and plaintiff in error was tried, and said order, decree and judgment deprived petitioner and plaintiff in error of his license without due process of law, and denied to him the equal protection of the law in violation of the Fourteenth Amendment.

I. V. McPherson, R. H. Davis and W. J. Owen, Attorneys for Petitioner and Plaintiff in Error.

[File endorsement omitted.]

[fol. 110] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Oct. 16, 1924

On reading of the petition of Leon Hurwitz for writ of errors and the Assignment of Errors, and upon due consideration of the record of said cause; it is ordered, that a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Missouri, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with the law, upon condition that said petitioner and plaintiff in error, Leon Hurwitz, give security in the sum of One Thousand Dollars, that the said plaintiff in error shall prosecute said writ of error to effect, and, if said plaintiff in error fail to make his plea good, shall answer to the defendants in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of One Thousand Dollars, with C. A. Hart, J. N. Hart and Bertha

Lueke as sureties, it is ordered that the same be and is hereby duly [fol. 111] approved.

In witness whereof, I have hereunto set my hand this 16th day of October, 1924.

W. W. Graves, Chief Justice of the Supreme Court of the State of Missouri.

[File endorsement omitted.]

[fol. 112] IN SUPREME COURT OF MISSOURI

WRIT OF ERROR—Filed Oct. 16, 1924

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Division Number One, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of affirmance by Division No. 1 of the Supreme Court of the State of Missouri on appeal from the judgment of the Circuit Court of Jasper County, Missouri, before you or some of you, said Supreme Court being the highest court of law and equity of said State of Missouri in which decision and judgment could be had in the said suit between the State of Missouri at the relation of Leon Hurwitz, Realtor, and Emmett P. North, Franklin E. Murphy, Cortez F. Enlow, E. E. Bruner, T. A. Son and R. S. Vitt, Respondents, and composing the Missouri State Board of Health, wherein was drawn in question the validity of a statute of the State of Missouri, and the authority exercised by respondents under said statute on the ground that said statute was in contravention of the Fourteenth Amendment to the Constitution of the United States, and the decision of said Supreme Court of Missouri was in favor of the validity of said statute; and wherein was drawn in question the validity of the order, decree or judgment of the Missouri State Board of Health composed of the above named respondents, suspending and revoking the license of relator to practice medicine and surgery in the State of Missouri on the ground that said order and judgment of suspension and revocation deprived relator of his license without due process of law in violation of said Fourteenth Amendment; and that said order and judgment of suspension denied to him the protection of the law in contravention of said Fourteenth Amendment, and wherein was drawn in question the judgment of [fol. 113] the Circuit Court of Jasper County, Missouri, affirming said order and judgment of suspension and revocation on the ground that said judgment of affirmance deprived relator of his license without due process of law and denied him the protection of the law in violation of the Fourteenth Amendment of the Constitution of the

United States; and the decision and judgment of the said Supreme Court was in favor of the validity of the said order and judgments of said State Board of Health and said Circuit Court; a manifest error had happened to the great damage and wrong of said relator as is said and appears by his complaint. We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C. within thirty days from the date hereof; that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Wm. Howard Taft, Chief Justice of the United States, this 16th day of October, the year of our Lord, 1924.

Edwin R. Durham, Clerk. F. J. Frowmel, Deputy Clerk of the United States District Court, Western District of the State of Missouri. (Seal of the United States District Court of Missouri. Central Division. Western District.)

The above writ is allowed by W. W. Graves. Chief Justice of the Supreme Court of Missouri.

[File endorsement omitted.]

[fols. 114 & 115] Bond on Writ of Error for $1,000—Approved and Filed Oct. 16, 1924; omitted in printing

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[fol. 116] Citation—In usual form, showing service on Jesse W. Barrett; filed Oct. 23, 1924; omitted in printing

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[fols. 117 & 118] In Supreme Court of Missouri

Clerk's Certificate

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in a cause between State of Missouri, at the Relation of Leon Hurwitz, Appellant, and Emmett P. North, Franklin E. Murphy, Cortez F. Enloe, E. E. Bruner, T. A. Son, T. H. Wilcoxen, and R. S. Vitt, Respondents

(No. 25,165), as fully as the same appear of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson, State aforesaid, this 10th day of November, 1924.

J. D. Allen, Clerk of the Supme Court of the State of Missouri. (Seal of the Supreme Court of Missouri.)

Endorsed on cover: File No. 30,702. Missouri Supreme Court. Term No. 209. The State of Missouri at the relation of Leon Hurwitz, plaintiff in error, vs. Emmett P. North, Franklin P. Murphy, Cortez F. Enlow, et al. Filed November 20, 1924. File No. 30,702.

(3)

Office Supreme Court, U. S.
FILED
SEP 21 1925
WM. R. STANSBURY
CLERK

No. 209.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

THE STATE OF MISSOURI AT THE RELATION OF LEON HURWITZ, PLAINTIFF IN ERROR,

VS.

EMMETT P. NORTH, FRANKLIN E. MURPHY, CORTEZ F. ENLOW, ET AL., DEFENDANTS IN ERROR.

STATEMENT OF CASE, ASSIGNMENT OF ERROR AND BRIEF OF PLAINTIFF IN ERROR.

I. V. McPherson,
Attorney for Plaintiff in Error.

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No. 209.

IN THE

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OCTOBER TERM, 1925.

THE STATE OF MISSOURI AT THE RELATION OF LEON HURWITZ, PLAINTIFF IN ERROR,

VS.

EMMETT P. NORTH, FRANKLIN E. MURPHY, CORTEZ F. ENLOW, ET AL., DEFENDANTS IN ERROR.

STATEMENT OF CASE.

This cause comes to this court upon writ of error to review the opinion and judgment of the Supreme Court of Missouri (reported in 264 S. W. 678), affirming the judgment of the Circuit Court of Jasper County, Missouri, confirming an order of the Missouri State Board of Health revoking or suspending the license issued by said board of health to plaintiff in error authorizing him to practice medicine and surgery in the State of Missouri.

Roy Coyne, Prosecuting Attorney of Jasper County, Missouri, in March, 1923, filed with said

board of health his petition or complaint praying that the license of plaintiff in error to practice medicine and surgery in the State of Missouri be revoked.

It is alleged, in said petition or complaint, that Leon Hurwitz, plaintiff in error herein, is a duly licensed physician and surgeon of the State of Missouri, and is practicing said profession in the City of Joplin, Missouri, and that "said Leon Hurwitz has been and is guilty of unprofessional and dishonorable conduct, in this, to-wit; that he, the said Leon Hurwitz, on or about the 1st day of May, 1922, in the City of Joplin, State of Missouri, unlawfully produced a criminal abortion upon one Almeda Stewart, a pregnant woman," etc. (Transcript of Record, p. 5).

Upon the filing of said complaint, a citation was issued by said board of health notifying him to be and appear before said board of health, on April 6th, 1923, at the Connor Hotel, Joplin, Missouri, and show cause why his license should not be revoked, which citation was in due time served upon plaintiff in error.

A trial of said charge was had before said board, on April 6th, and the license of plaintiff in error was revoked or suspended for a period of fifteen years.

A demand was made, before trial, by plaintiff in error herein, upon the secretary of said board of health, for a subpoena for Dr. Benton, Neosho, Mis-

souri, and for Drs. Clark and Hoshaw, Joplin, Missouri, and for a subpoena *duces tecum* for James Jackson, Joplin, Missouri, commanding him to have and produce, at the trial, for the purpose of being introduced in evidence, a certain prescription issued to said Almeda Stewart by a Dr. James, and filled by the Jackson Drug Company, of which said Jackson was secretary and general manager, and in control of the books and papers of said drug company. This request was refused, and plaintiff in error was forced to go to trial without the testimony of any of said witnesses and without said prescription.

A motion was filed by plaintiff in error with said board of health to quash and dismiss the complaint filed by Roy Coyne, as aforesaid, for the following reasons, among others therein stated, to-wit: (1) that said complaint was filed without authority of law, and that said board of health was, by reason thereof, without jurisdiction; (2) that Section 7336, Revised Statutes of Missouri for 1919 did not authorize or empower said board of health to issue compulsory process for witnesses and for the production of books and papers, and was in conflict with the 14th Amendment to the Constitution of the United States; (3) that said board of health had refused, upon application of plaintiff in error therefor, to issue subpoenas for witnesses for plaintiff in error and for the production of papers; (4) that said Section 7336 does not provide the necessary

machinery for an orderly, fair and impartial investigation of, and defense of, the charge preferred (Transcript of Record, pages 11, 12 and 13). This motion was overruled.

Upon entry of order by the board of health revoking license of plaintiff in error, and upon application therefor by plaintiff in error herein, the Circuit Court of Jasper County, Missouri, issued a writ of certiorari directed to said board of health commanding them to certify to said Circuit Court a complete transcript of all proceedings had in the matter of the application of Roy Coyne, prosecuting attorney, to revoke license of plaintiff in error, together with copies of all motions together with the complaint filed therein, and the order of suspension or revocation.

After the service of said writ, and in obedience to the command thereof, said board of health caused to be certified to said Circuit Court a transcript of the complaint filed by Roy Coyne, as aforesaid, the citation, the return of service thereof, order of suspension or revocation, together with all motions and papers filed in the case, together with a transcript of all evidence introduced at the trial.

Upon the filing of said transcript in said Circuit Court, plaintiff in error herein filed his motion to quash the record and proceedings of said board of health, which motion was overruled.

It is alleged in said motion to quash (1) that Roy Coyne was not authorized or empowered by

law to file said complaint, and that the board of health was, therefore, without jurisdiction of the subject matter of said complaint; (2) that Section 7336, Revised Statutes of Missouri, 1919, under which said complaint was filed, and said proceedings had, was null and void, in that it did not authorize or empower said board of health to issue compulsory process for witnesses and for the production of books and papers, and in that said section was in contravention of the 14th Amendment to the Constitution of the United States; (3) that said board of health refused, upon application therefor by plaintiff in error herein, to issue subpoenas for Dr. Benton, Dr. Clark, Dr. Hoshaw and to issue subpoena *duces tecum* for James Jackson, of the Jackson Drug Company, to produce at the trial prescription No. 15760; (4) that said Section 7336 is too vague and indefinite to be enforced and that it does not provide the means or machinery for the revoking of licenses issued thereunder (Transcript of Record, pages 31, 32, 33).

This motion was overruled, and thereupon the court, by its order and judgment, affirmed the order of the board of health revoking the license of plaintiff in error. Thereafter, in due time, plaintiff in error herein filed his motion to vacate and set aside said judgment of the Circuit Court, affirming the order of suspension or revocation of the license of plaintiff in error, which said motion alleges as grounds therefor: (1) that Section 7336, R. S.

1919, does not provide who may, nor authorize any one to, file complaints to revoke licenses of physicians and surgeons who may be suspected of violating the terms and provisions of said section, and that said section is therefore void; (2) that the action of the court in overruling motion of plaintiff in error to quash the order of said board of health, and in rendering judgment affirming said order of said board of health, deprived plaintiff in error of his license without due process of law (Transcript of Record, pages 34, 35).

It was contended and argued, in the Supreme Court of Missouri, on appeal by plaintiff in error herein from said judgment of said Circuit Court, that said complaint was filed without authority of law, and, therefore, the board of health had no jurisdiction of the subject matter of said complaint.

It was ruled and held by the Supreme Court of Missouri that Coyne had no authority as prosecuting attorney to file said complaint, but he had, as a citizen, authority to file said complaint, and that the words "prosecuting attorney" wherever they appeared in said complaint, and following his name, would be construed either as surplusage or a mere description of the person (Transcript of Record, page 40).

It was further contended and argued by plaintiff in error herein in the Supreme Court of Missouri (1) that said Section 7336, R. S. 1919, conferred, by implication, power and authority upon

the board of health to issue compulsory process for witnesses and for the production of books and papers, and (2) that if it did not, then it was in conflict with the 14th Amendment, in that it authorizes the revocation of license issued by the state to physicians to practice medicine without due process of law.

The Missouri Supreme Court ruled and held that said section did not confer, by implication, power or authority upon said board of health to issue process for witnesses and for the production of books and papers, and it was further ruled and held that said section afforded due process of law, in that plaintiff in error was afforded the right to take depositions of witnesses and to read such depositions in evidence at the trial (Transcript, pages 41, 42, 43).

Plaintiff in error herein, within the time provided by the rules of the Missouri Supreme Court, filed his motion for a rehearing, which motion alleges: (1) that the court erred in holding that said Section 7336 was not in conflict with the 14th Amendment; (2) that the court erred in holding that the order of the board of health revoking the license of plaintiff in error did not deprive him of his license without due process of law; (3) that the court erred in holding that Roy Coyne, either as prosecuting attorney or as a private citizen, had the right, authority and power, under said Section 7336, to file complaint against plaintiff in error

herein; (4) that the court erred in holding that Section 7336, R. S. 1919, does not grant, by implication, power and authority to said board of health to issue compulsory process for witnesses.

This motion was overruled, as well as motion to transfer cause to the court *in banc* (Transcript of Record, pages 44, 45, 50).

Upon overruling of motions for rehearing and to transfer to court *in banc*, plaintiff in error herein presented to the Hon. W. W. Graves, Chief Justice of the Supreme Court of Missouri, his petition, praying that he be allowed a writ of error from the Supreme Court of the United States, etc., and it was thereupon ordered that the writ prayed be allowed, etc. (Transcript, pages 52, 53, 54, 55, 56, 57, 58, 60).

The petition for writ of error was accompanied by an assignment of errors, which is, as follows:

(See Transcript of Record, pp. 58, 59, 60.)

ASSIGNMENT OF ERRORS.

(1)

The Supreme Court of Missouri erred in holding that Roy Coyne, as a private citizen, had the authority and power, under Section 7336, Revised Statutes of Missouri for 1919, to file the petition or complaint under which the license of plaintiff in error to practice medicine was revoked by the Missouri State Board of Health, and in holding that said board had jurisdiction of the subject matter of the complaint.

(2)

The Supreme Court of Missouri erred in holding that said Section 7336 did not authorize and empower said board of health to issue compulsory process for witnesses and for the production of books and papers, and in holding that the revocation of the license of plaintiff in error by said board of health, and the confirmation of the order of revocation by the Circuit Court did not deprive plaintiff in error of his said license without due process of law, in violation of the 14th Amendment

(3)

The Supreme Court of Missouri erred in not holding that said Section 7336 authorizes and empowers said board of health to issue compulsory process for witnesses and for the production of

books and papers before said board, to be used in evidence in the trial of complaints filed to revoke the license of physicians, and in not holding that the denial of the application or request of plaintiff in error for subpoenas for certain witnesses and for the production of a certain prescription in the possession, or under the control, of one James Jackson, and in forcing plaintiff in error to go to trial without the benefit of the testimony of said witnesses and of said prescription, denied to him the equal protection of the laws, and that he was, by reason thereof, deprived of his said license without due process of law, in violation of the 14th Amendment.

(4)

The Supreme Court of Missouri erred in holding that said Section 7336 provides for the evidence to be submitted by deposition, rather than by the attendance of witnesses, and that said section affords due process of law, and in holding that the order of said board of health, revoking the license of plaintiff in error, and that the affirmance of said order by the Circuit Court, did not deprive him of his license without due process of law, and that the revocation of said license by said board of health and the affirmance of said order by the Circuit Court did not deny to him the equal protection of the laws, in violation of the 14th Amendment.

(5)

The Supreme Court of Missouri erred in not holding that the order of said board of health, revoking the license of plaintiff in error to practice medicine, and the confirmation of said order by the Circuit Court, did not deprive him of his said license without due process of law, and that he was denied the equal protection of the laws, in violation of the 14th Amendment.

POINTS AND AUTHORITIES.

The writ of error was rightfully issued, and this Honorable Court is possessed of jurisdiction of the cause.

The motion filed by plaintiff in error with the Missouri State Board of Health, to quash and dismiss the proceedings instituted by Roy Coyne, prosecuting attorney, to revoke the license issued to plaintiff in error to practice medicine and surgery, alleges: (1) that the petition or complaint was filed without authority of law, and that said board was, therefore, without jurisdiction; (2) that section 7236, Revised Statutes of Missouri for 1919, under which said board was acting in the matter before it, was in conflict with the 14th Amendment to the Constitution of the United States; that said board, upon application and request therefor, refused to issue subpoenas for witnesses and for the production of papers to be used in the trial of the cause (Transcript of Record, pages 7 and 8).

The motion filed by plaintiff in error in the Circuit Court to quash the record and the order of said board of health, revoking the license of plaintiff in error to practice medicine, alleges: (1) that Roy Coyne had no authority in law to file the petition or complaint under which plaintiff's license was revoked, and that said board of health was, therefore, without jurisdiction of the subject matter of said complaint; (2) that said Section 7236, R. S. 1919, under which said proceedings were had,

was in conflict with the 14th Amendment; (3) that said board of health had, upon application and request therefor, refused to issue subpoenas for certain witnesses and for the production of a certain prescription (Transcript of Record, pages 31, 32 and 33).

The questions raised by these motions were duly presented to the Supreme Court of Missouri for decision, on appeal, as appears at pages 37, 38 and 39 of the Transcript of the Record, and from the opinion filed in the Supreme Court, 264 S. W. 678.

These motions, in the opinion of counsel for plaintiff in error, raised Federal questions, and are real, substantial and open questions before this Honorable Court.

O'Neil v. *Leamer*, 239 U. S. 244.
Union Lime Co. v. *Chicago & N. W. R. Co.*, 233 U. S. 211.
Old Wayne Mut. L. Ass'n v. *McDonough*, 204 U. S. 8.
Keerl v. *State of Montana*, 213 U. S. 135.
Daniels v. *Tearney*, 102 U. S. 415.
Philadelphia Fire Ass'n v. *New York*, 119 U. S. 110.
McPherson v. *Blacker*, 146 U. S. 1.
Boyd v. *Neb.*, 143 U. S. 135.
Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226.
Spencer v. *Merchant*, 125 U. S. 345.
Huntington v. *Attrill*, 146 U. S. 657.
Bonahan v. *Neb.*, 118 U. S. 231.

In *O'Neil* v. *Leamer, supra*, ..., Judge, speaking for the court, said:

> "A contention that an appropriation of land for a drainage district was essentially for a private purpose, and hence contrary to the United States Constitution, 14th Amendment, as amounting to a deprivation of private property without due process of law, presents a Federal question which will support a writ of error from the Federal Supreme Court to a state court, where the latter court denied the right asserted."

It was contended, in *Union Lime Company* v. *Chicago & N. W. R. Co., supra,* that the land sought to be condemned by defendant in error for a spur track was sought to be taken for private purpose, and not for public use, and that its taking would, therefore, operate as a deprivation of the property of plaintiff in error without due process of law, and a denial to it of the equal protection of the laws, contrary to the 14th Amendment. This contention was overruled by the State Supreme Court, and the judgment of condemnation was affirmed, and thereupon a writ of error was prosecuted to this Honorable Court, where the cause was duly reviewed.

It appears, in *Old Wayne Mutual Life Association* v. *McDonough, supra,* that judgment was rendered against the association and in favor of McDonough, in the State of Pennsylvania, and thereafter suit was brought upon this judgment against plaintiff in error in the State of Indiana.

Plaintiff in error insisted, in the last suit, that the Pennsylvania court had no jurisdiction to pro-

ceed against it; and consequently the judgment it rendered was void for the want of the due process of law required by the 14th Amendment. This contention was denied by the State Supreme Court, and thereupon a writ of error was prosecuted to this court, where said contention was upheld.

Mr. Justice Brewer, in *Keerl* v. *State of Montana, supra,* in delivering the opinion of the court, at page 137, used the following language:

> "The defendant during the trial having specifically claimed that the action of the court in denying him the benefit of the plea of once in jeopardy operated to deprive him of his liberty without due process of law, contrary to the 14th Amendment to the Constitution of the United States, our jurisdiction of the writ can not be questioned."

(2)

The Missouri State Board of Health did not have jurisdiction of the subject matter of the petition or complaint under which the license of plaintiff in error was revoked or suspended, and the order of said board, revoking or suspending said license, and the judgment of the Circuit Court, confirming said order, and the judgment of the Supreme Court of Missouri, affirming the judgment of the Circuit Court, deprived him of said license without due process of law and denied to him the equal protection of the laws, in violation of the 14th Amendment.

A judgment of a court, or the order of a Governmental body or agency, without jurisdiction of the subject matter or of the person, which affects property rights or personal rights or privileges, is violative of the 14th Amendment.

Pennoyer v. *Neff*, 95 U. S. 730.
Riverside etc. Mills v. *Menefee*, 237 U. S. 189.
Simon v. *So. Ry. Co.*, 236 U. S. 115, l. c. 122.

The right of plaintiff to practice medicine and surgery, under the license granted to him by the State of Missouri, was a valuable right, if not a property right in the technical sense, and within the protection of the due process clause and of the equal protection of the law clause of the 14th Amendment.

State ex rel. Spriggs v. *Robinson et al.*, 253 Mo. 270, l. c. 284.
State ex rel. Johnson v. *Clark et al.*, 232 S. W. (Mo.) 1031.
State ex rel. Shackelford v. *McElhiny*, 241 Mo. l. c. 606.
Erkern v. *McGovern*, 142 N. W. 595, 46 L. R. A. (N. S.) 796.
People v. *Love*, 298 Ill. 304, 16 A. L. R. 703, l. c. 707.

Section 7336, Revised Statutes of Missouri for 1919, under which the petition or complaint was filed and under which the license of plaintiff in error was revoked, does not, nor does any other statute, authorize or empower any officer or any citizen to prefer and file with said board of health

petitions or complaints, to have revoked the licenses issued to physicians to practice medicine and surgery, and said Board of Health was, therefore, without jurisdiction to receive, hear and try the petition or complaint filed against plaintiff in error.

Said Section 7336 reads as follows:

"The board may refuse to license individuals of bad moral character, or persons guilty of unprofessional conduct, and they may revoke licenses, or other rights to practice, however derived, for like causes, and in cases where the license has been granted upon false and fraudulent statements, after giving the accused an opportunity to be heard in his defense before the board as hereinafter provided. Habitual drunkenness, drug habit or excessive use of narcotics, or producing criminal abortion, or soliciting patronage by agents, shall be deemed unprofessional and dishonorable conduct within the meaning of this section. At least twenty days prior to the date set for any such hearing before the board for the revocation of such license, the secretary of the board shall cause written notice to be personally served upon the defendant in the manner prescribed for the serving of original writs in civil actions. Said notice shall contain an exact statement of the charges and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel, at the time and place designated in said notice, the board shall, after receiving satisfactory evidence of the truth of the charges and the proper issuance and service of notice, revoke said license. If the licentiate appear either in person or by

counsel, the board shall proceed with the hearing as herein provided. The board may receive and consider depositions and oral statements and shall cause stenographic reports of the oral testimony to be taken and transcribed, which, together with all other papers pertaining thereto, shall be preserved for two years. If a majority of the board are satisfied that the licentiate is guilty of any of the offenses charged, the license shall be revoked for such period of time as may be agreed upon. Any person whose license has been or shall be revoked by the board shall have the right to have the proceedings of said board revoking his license and all the evidence therein reviewed, or a writ of certiorari, by the Circuit Court of the county in which said board held its session when said license was revoked. Said writ shall issue upon the petition of the person whose license shall have been revoked to said court or to the clerk thereof in vacation at any time within ninety days after such revocation, and shall command the said board and the secretary thereof to certify to said court the record and proceedings of said board, and a complete transcript thereof, and of all the evidence therein pertaining to the revocation of said license. The petitioner for the writ of certiorari shall set forth the rights of the petitioner and the injuries complained of by him and shall be verified by him. If the proceedings of the board shall be sustained or upheld by the Circuit Court, its orders, decisions or judgments revoking said license shall remain and continue in full force and effect. And any such license so revoked by the board shall, pending said review on certiorari, stand revoked and so remain until the proceedings of the board relating thereto shall be quashed or otherwise annulled by the Circuit Court on

said writ of certiorari. Testimony may be taken by deposition, to be used in evidence on the trial of such charges before the board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases."

It was ruled and held, in the case of *State ex rel. Westhues* v. *Sullivan*, 283 Mo. 546, that prosecuting attorneys have no power or authority to institute suits in the name of and on behalf of the state, except in matters local to the counties of which they are officers.

The above rule appears to have been reaffirmed in the opinion of the court in the case at bar; but it was further ruled and held that said Section 7336 was broad enough to permit any citizen to prefer charges. *State ex rel. Hurwitz* v. *North et al.*, 264 S. W. 678.

Said Section 7336 does not expressly give to said board any power or authority to prefer, on its own motion, charges or complaints upon which to try physicians and to revoke their licenses, nor does said section expressly give such right to any citizen.

Section 3031, Revised Statutes of Missouri for 1899, provided that local option elections "May be contested in the same manner as is now provided by law for the contest of the elections of county officers in this state"; but said section made no provision authorizing or empowering any one to file

and prosecute such a contest, nor did it provide who should be made defendant or defendants.

This section came under review in the case of *Kehr* v. *City of Columbia*, 136 Mo. App. 322, which was a suit to contest an election held under the so called local option law, and it was held by the court that said section could not be enforced, for the reason that the trial court was without jurisdiction of the subject matter of the suit—the legislature having failed to authorize or empower any one to institute and prosecute such a contest, and having also failed to provide against whom such suit should be prosecuted.

(3)

If said board of health had jurisdiction of the subject matter of the complaint (as the Supreme Court of Missouri held it had), then it had the implied power to issue subpoenas for Dr. Clark and Dr. Hoshaw and for James Jackson, the druggist.

In re Sandford, 236 Mo. 665.
State ex rel. v. *Mason*, 165 Mo. 486.
Roberts v. *Improvement Co.*, 200 Mo. App. l. c. 177.

In re Sandford, supra, the petitioner Sandford was held for contempt, under a commitment issued by the Board of Equalization of Green County, Missouri, for refusing to testify in a case pending before it in relation to the matter of the increase of the tax assessment of one Hendrick by said board of equalization. It was there contended that even

though the board of equalization had the power to issue subpoenas and to send for books and papers, yet the law did not confer upon said board the power or authority to commit for contempt for failure to produce the books and papers called for in the subpoena, and upon refusal of the witness to testify. It was held by the Supreme Court that the board, in the exercise of its powers, acted judicially (page 689), and that the power to commit for contempt was conferred by implication—the court, speaking through Woodson, judge, at page 692, said:

> "There is a familiar rule of statutory construction which fits this case like a glove fits the hand, namely, that when a power is given by statute everything necessary to make it effectual or requisite to attain the end, is necessarily implied."

The rule is stated in Southerland on Statutory Construction, Sec. 341, as follows:

> "* * * A statute authorizing a magistrate to examine such witnesses as might be brought before him authorizes him to issue subpoenas for them and to compel their attendance by the usual process of the court."

If Section 7336, *supra*, authorizes and empowers, by implication (as held by the Supreme Court of Missouri in this case) any citizen to prefer and file complaints or charges against physicians to have their licenses to practice medicine revoked, then said section certainly is broad enough to au-

thorize and empower, by implication, said board to issue process for witnesses and for the production of books and papers.

(4)

The action of the board of health in denying plaintiff in error subpoenas for Dr. Clark, Dr. Hoshaw and for James Jackson, the druggist, and in forcing a trial without the testimony of said witnesses and without the prescription in the possession and control of Jackson, deprived plaintiff of his license without due process of law and denied to him the equal protection of the laws.

It was held by the Missouri Supreme Court that Section 7336 does not violate the 14th Amendment, "because it provides for the evidence to be submitted by deposition, rather than by the personal attendance of witnesses" (Transcript of Record, pages 42, 43).

All that part of Section 7336 relating to the taking and the use of depositions reads, as follows:

> "Testimony may be taken by deposition, to be used in evidence on the trial of the charges before the board in the *same manner and under the same rule and practice as is now provided* for the taking of depositions in civil cases."

Section 5467, Revised Statutes of Missouri for 1919, provides under what circumstances and conditions depositions of witnesses may be read in evidence, and reads, as follows:

"Examinations or depositions taken and returned in conformity to the provisions of this article may be read and used as evidence in the cause in which they shall have been taken, as if the witnesses were present and examined in open court on the trial thereof. The facts which would authorize the reading of the deposition may be established by the testimony of the deposing witness or the certificate of the officer taking the same: First, if the witness resides or is gone out of the state; second, if he be dead; third, if by reason of age, sickness or bodily infirmity he be unable to or cannot safely attend court; fourth, if he reside in a county other than that in which the trial is held, or if he be gone to a greater distance than forty miles from the place of trial without the consent, connivance or collusion of the party requiring his testimony; fifth, if he be a judge of a court of record, a practicing attorney or physician, *and engaged in the discharge of his official or professional duty at the time of the trial*" (italics ours).

If plaintiff in error had taken the depositions of Clark and Hoshaw, said depositions could not have been, under said Section 5467, read in evidence at the trial, in the absence of a satisfactory showing to the board of health that said witnesses were, at the time of the trial, engaged in their professional duties, *an impossible task in the instant case*, and a difficult task in any case.

Section 5420, Revised Statutes of Missouri for 1919, provides:

> "In all causes where witnesses are required to attend the trial in any cause in any court of record, a summons shall be issued by the clerk of the court wherein the matter is pending, or by some notary public or justice of the peace of the county wherein such trial shall be had, stating the day and place," etc.

The plaintiff and defendant in the most insignificant cause, pending in a court of record, are afforded, under the above quoted section, compulsory process for his witnesses; but a physician, in a proceeding to revoke his license to practice medicine, is denied the right afforded every plaintiff and defendant in a cause pending in a court of record to compulsory process for his witnesses and to have his witnesses testify on the witness stand in open court, although such cause in the court of record may involve only a few dollars, while the proceedings before the board of health involve the right to pursue a profession, probably worth thousands of dollars yearly. No one would, for a moment, contend that an order or judgment of a court of law or equity which affects the personal or property rights of one, would constitute due process of law, or that such party was afforded the equal protection of the laws, if such person had been refused process for his witnesses.

The case of the *State of Washington ex rel. Railroad Co.* v. *Fairchild*, 224 U. S. 510, we believe is an authority in support of the contentions urged in this case. The statute under which the proceed-

ings were had in the above case provided for the issuance of subpoenas for witnesses and for the production of books and papers, and also provided for the taking and for the use of depositions. ....., Judge, speaking for the court, at pages 524, 5, uses the following language:

> "The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established."

We believe our contention is supported by the following quotation from the opinion of this court, in *Railroad Co.* v. *Schmidt*, 177 U. S. 230, viz:

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment does not control the mere forms of procedure in the state courts, or regulate the procedure therein. All its requisites are complied with, *provided in the proceedings in which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend*" (italics ours).

(5)

If said Section 7336 does not afford due process of law and if it denies the equal protection of the laws, then the construction placed thereon in this case by the Supreme Court of Missouri is not bind-

ing on this court, although said section is a statute of procedure.

Powers v. *Penn.*, 127 U. S. 678.
McDonald v. *Mabee*, 243 U. S. 90.
Pennoyer v. *Neff*, 95 U. S. 714.
Riverside Mills v. *Menefee*, 237 U. S. 189.
Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226.
Ex parte Reggel, 114 U. S. 642.
Roller v. *Holly*, 176 U. S. 398.
Haddock v. *Haddock*, 201 U. S. 562.

It was held, in *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, l. c. ...., that a state statute which imposed an attorney's fee upon railroad companies omitting to pay certain claims within a certain time after presentation and demand of payment, and which only applied to railroad companies, was unconstitutional, for the reason that it denied the equal protection of the laws to railroad companies.

If the dividing of corporations into two classes, and the imposition upon one class of an attorney's fee in certain instances, and the exempting of all other corporations of a like burden, amount to a denial of the equal protection of the laws, should not the same rule apply in this case?

If Section 7336 limits the defense of physicians, whose licenses are sought to be revoked, to the use of depositions, which can be used at the trial under limited circumstances, then such physicians are deprived of rights given to plaintiffs and defendants in actions at law and in equity.

If Section 7336 limits (as held by the Missouri Supreme Court in this case) the defense of physicians, whose licenses are sought to be revoked, to the use of depositions, which can be used at the trial under limited circumstances, then said section does not afford an adequate opportunity to defend; and unless opportunity is afforded to refute and disprove every fact material to the case, said section violates the 14th Amendment, because it authorizes the taking of valuable rights and privileges, if not property rights, without due process of law, and because it denies the equal protection of the laws.

It is respectfully submitted that the judgment of the Supreme Court of Missouri be reversed, etc.

I. V. McPherson,
Attorney for Plaintiff in Error.

(4)

FILED
FEB 24 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

THE STATE OF MISSOURI, at the relation of LEON HURWITZ, *Plaintiff in Error*,
vs.
EMMETT P. NORTH et al., *Defendants in Error*.

No. 209.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

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Error.

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STATEMENT.

The statement of the case made by plaintiff in error is fair enough, hence defendants in error will not restate same.

BRIEF.

POINTS AND AUTHORITIES.

I.

FEDERAL QUESTION.

Defendants in error concede the jurisdiction of the Court to review this case.

II.

JURISDICTION OF STATE BOARD OF HEALTH.

Jurisdiction is the right to hear and determine a cause.

The Legislature of Missouri gave the State Board of Health of Missouri the power to refuse licenses to practice medicine and surgery in Missouri to individuals of bad moral character or persons guilty of unprofessional or dishonorable conduct, and the power to revoke such licenses for like causes (producing criminal abortion, among other things, is defined by statute to be unprofessional and dishonorable conduct) after giving the accused an opportunity to be heard in his defense before the Board and requires at least twenty (20) days personal notice of the time and place, together with an

exact statement of the charges. If the accused fails to appear, either in person or by counsel, the Board shall, after receiving satisfactory evidence of the truth of the charges, and the proper issuance and service of notice, revoke said license.

If the licentiate appear, either in person or by counsel, the Board shall proceed with the hearing and may receive and consider depositions and oral statements, and shall cause stenographic notes of the oral testimony to be taken and transcribed, which, together with all other papers pertaining thereto, shall be preserved for two years. If a majority of the Board are satisfied of the guilt of the accused, his license shall be revoked for such period as may be agreed upon.

The statute further provides that the action of the Board may be reviewed by the Circuit Court in the county where said license was revoked, upon the issuance of a writ of certiorari.

The statute further provides that "testimony may be taken by deposition, to be used in evidence on the trial of such charges before the Board, in the same manner and under the same rules of practice as is now provided for the taking of depositions in civil cases."

The ruling of Circuit Courts under this statute have been duly reviewed by the Supreme Court of Missouri upon appeal from said courts.

Section 7336, R. S. of Mo. 1919;

State vs. Shot, 263 S. W. l. c. 805;

State ex rel. Johnson vs. Clark et al., 232 S. W. 1031;

Daniels vs. Tearney, 102 U. S. l. c. 418.

III.

CONSTITUTIONALITY OF SECTION 7336, R. S. OF MO., 1919.

The Legislature of Missouri has the power under the Constitution of Missouri to pass all necessary laws to guard the morals, safety and health of the people, even if such laws should in some degree operate as a restraint upon recognized constitutional rights.

State vs. Hathaway, 115 Mo. l. c. 45-49;

State vs. Smith, 233 Mo. l. c. 264-69;

Douglas vs. Noble, 261 U. S. l. c. 170;

Collins vs. Texas, 223 U. S. l. c. 297;

Hawker vs. N. Y., 170 U. S. l. c. 191-2;

Watson vs. Maryland, 218 U. S. l. c. 176-8.

IV.

DUE PROCESS.

Due process of law guaranteed by the fourteenth amendment of the Constitution of the United States has regard to substance of right, and not to matters of form or *procedure*.

The complaint made by plaintiff in error in this regard relates to the *procedure* provided by statute

to secure the testimony of witnesses unwilling to voluntarily appear and testify before the State Board of Health of Missouri. This complaint is without merit.

Frank vs. Mangum, 237 U. S. l. c. 331;
Dent vs. W. Va., 129 U. S. 114;
Reetz vs. Michigan, 188 U. S. l. c. 508;
State of Washington vs. Fairchild, 224 U. S. l. c. 525;
L. & N. R. R. Co. vs. Schmidt, 177 U. S. l. c. 236;
Watson vs. Maryland, 218 U. S. l. c. 175.

V.

EQUAL PROTECTION OF THE LAW.

Section 7336, R. S. of Missouri, 1919, applies to all physicians and surgeons alike, hence is not violative of the equal protection of the law clause of the fourteenth amendment of the Constitution of the United States.

Duncan vs. Missouri, 152 U. S. l. c. 382;
McLean vs. Ark., 211 U. S. l. c. 551-2;
Watson vs. Maryland, 218 U. S. l. c. 178-79.

VI.

PRESUMPTION OF VALIDITY.

Statutes are presumed to be constitutional, and it is the duty of the court in testing their validity to resolve all doubt in favor of legislative action.

State vs. Cantwell, 179 Mo. l. c. 261;
Same case affirmed, 199 U. S. 602;
Ex parte Young, 209 U. S. l. c. 165.

VII.

USE OF DEPOSITIONS.

Said Section 7336, supra, provides that "the Board may receive and consider depositions and oral statements and shall cause stenographic reports of the oral testimony to be taken and transcribed, which, together with all other papers pertaining thereto, shall be preserved for two years * * *. Testimony may be taken by deposition, to be used in evidence on the trial of such charges before the Board, in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases."

No *condition* or *limitation* is therein expressed as to the *use* of said deposition, and such is the holding of the Supreme Court of Missouri.

State vs. Shot, 263 S. W. l. c. 805;
State ex rel. Hurwitz vs. North et al., 264 S. W. l. c. 682.

VIII.

IMPLIED POWER TO ISSUE PROCESS.

Plaintiff in error contends in one instance and denies in another that the State Board of Health has implied power to issue process for books, papers

and witnesses, and that the Board wrongfully refused to issue its subpoenaes for certain documents and relator's witnesses.

"Implication" is but another name for intention. When the statute directs the performance of certain things in a particular manner, it forbids by implication every other manner of performance. Hence the procedure provided by the Legislature to secure the evidence of witnesses not voluntarily appearing implies that the Board may not issue compulsory process.

Brewster vs. Laynon Zinc Co., 140 Fed. l. c. 809;

State vs. Shot, supra.

State ex rel. Hurwitz vs. North et al., supra.

36 Cyc. 1122.

IX.

COMPLAINT.

The complaint is sufficient and valid. Any one may make a complaint before the State Board of Health. The fact that it was made in this case by the Prosecuting Attorney is immaterial.

Section 7336, R. S. of Mo. 1919;

State ex rel. Johnson vs. State Board of Health, 288 Mo. l. c. 663;

State ex rel. vs. Goodier, 195 Mo. l. c. 554;

State ex rel. vs. Robinson, 253 Mo. l. c. 281;

State ex rel. Conway vs. State Board of Health, 266 Mo. l. c. 250;

State ex rel. Hurwitz vs. North et al., 264 S. W. l. c. 680.

ARGUMENT.

I.

No question is raised by defendants in error as to the right of review of this case by this court.

II, III.

The Legislature of Missouri has given the State Board of Health of Missouri the power to *hear* and *determine* charges or complaints made and filed against practitioners of medicine in this state for certain expressed offenses, among which is that of producing criminal abortion. A complete code is provided for such hearing from the institution of the charge before the Board of Health to the Circuit Court and from it finally to the Supreme Court of the State. This is a valid exercise of legislative power. It is a well recognized principle that the protection of the public health is one of the first duties of government. It is as much for the interest of the state that the public health should be preserved as that life should be made secure. Therefore, whatever rationally tends to promote and preserve the public health is an appropriate subject of legislation.

The criterion is whether the public health in general would be promoted, and not whether it is

required to promote the public health in isolated cases. When the object of the enactment is to promote public health, there is no constitutional invasion, even if the enforcement of the law interferes to some extent with liberty or property.

The state legislature may provide for the establishing of boards of health, or the appointment of health officers, and this both for the state at large and for local sub-divisions of the state. They are governmental agencies endowed by law with distinct legal rights. They act for the public and not as agents for the local authorities.

The question of the Board's jurisdiction has been recently passed upon by the Supreme Court of Missouri in the case of State vs. Shot, 263 S. W. At page 805 the Court, speaking through Chief Justice Graves, said:

> "The granting and revoking of such licenses are proper subjects of regulation under the police power of the state. * * * In the exercise of that power the law-makers had the right to vest in the State Board of Health the power to investigate and license physicians, and to investigate charges against a licensed physician, and in proper cases to revoke such license. This much does not seem to be denied."

IV.

Really, the only question seriously presented here by plaintiff in error is the alleged absence from the statute in question of any provision meeting the requirement of the due process clause of the Fourteenth Amendment of the Federal Constitution. (Tr. 57.)

In many decisions of this court it has been held that the due process of law guaranteed by the Fourteenth Amendment has regard to substance of right and not to matters of form or *procedure*.

The question here challenges the *procedure* only provided for taking testimony of witnesses not voluntarily appearing before the Board. The Supreme Court of Missouri in its decision of the case now under review held that Section 7336, supra, violated neither the State nor the Federal Constitution; that it provides for a hearing before the State Board of Health in the first instance and then a right of review in the courts, so that no physician can be shorn of his license without a court review if desired. (Tr. 41.)

The Missouri Supreme Court en banc has recently ruled (Farber vs. Shot, 263 S. W. 801) that either party to a hearing before the board may take and make proof by way of depositions, and this situation was considered in the instant case in determining the effectiveness of the statute as one

giving the parties due process of law. That Court correctly held (State vs. North, 264 S. W. l. c. 681) that "due process of law requires a hearing, after due notice has been given the party. * * * The law in question provides for a hearing upon evidence, after due notice, and for judgment after such hearing. Not only so, but it provides for a court review of the whole proceeding, and this relator had such hearing in the Circuit Court, and is now in this court upon appeal. By "due process" we do not always mean a court hearing. 'But neither proceedings according to common law, nor judicial proceedings in a formal court for a trial of actions, are essential to due process.' McGehee's Due Process of Law, page 52; 6 R. C. L., p. 459, Section 454. There must, however, be a hearing after due notice, an opportunity to defend the right involved, before a legally constituted body for determining such right of the citizen. The statute under consideration not only grants all these things, but to make the matter doubly sure, it provides for a court review." This holding is sustained by numerous decisions of this court.

In the case of State of Washington vs. Fairchild, 224 U. S., brought up from the State of Washington on writ of error, the question presented for review was whether or not the railroad company had been accorded due process of law by the Railroad Commission of that state in making certain orders relative

to said railroad. Mr. Justice Hughes, delivering the opinion for the court, said (page 525):

> "The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established. But, as construed by the state court, all these rights were amply secured by the statute, which declared that the Commission, 'after a full hearing,' might require track connection. On such investigation the company could have objected to the sufficiency of the complaint and obtained an order requiring it to be made more specific as to the exact location of the proposed tracks. The defendant was given the benefit of compulsory process to secure and present evidence in its behalf. There was a provision to require the attendance of witnesses, the production of documents and for the taking of testimony by deposition. It also had the right to cross-examine witnesses produced on the part of the Commission and the privilege of offering evidence on every matter material to the investigation."

In L. & N. Rd. Co. vs. Schmidt, 177 U. S., at page 236, Mr. Justice White for the court said:

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts nor regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

In Frank vs. Mangum, page 327 (237 U. S.), this Court, through Mr. Justice Pitney, said:

> "And while the Fourteenth Amendment does not require that a state shall provide for an appellate review in criminal cases (cases cited), it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment."

In view of the foregoing decisions, it is manifest that the plaintiff in error has been amply accorded due process of law and that his contention in this regard should be overruled.

V.

The terms of the statute in question here apply to all physicians and surgeons alike and can not be said to violate the equal protection clause of the Fourteenth Amendment of the United States Constitution.

In the case of Duncan vs. Missouri, 152 U. S., at page 382, touching this subject, Mr. Chief Justice Fuller for the court said:

> "Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

This point should be ruled against the plaintiff in error.

VI.

Plaintiff in error has wholly failed to sustain the burden of proving the Missouri statute complained of to be unconstitutional and thus overcome the presumption of its validity which must be indulged by the court.

VII.

Plaintiff in error assumes in his brief that depositions which he might have taken under the statute could have been used only conditionally or under limited circumstances. This is an erroneous assumption. Instead of giving the board power to issue subpoenaes and compulsory process the Legislature has provided a specific method of obtaining testimony of such witnesses, who may not attend voluntarily, namely, by deposition, and has authorized the use and consideration of such depositions in lieu of the personal attendance of such involuntary witnesses. This the legislature has the power to do. In the case of State vs. Shot, 263 S. W., at page 805, Chief Justice Graves for the Supreme Court of Missouri, in discussing this subject, used the following language:

> "The section of statute here for review not only empowers this board to hear and determine the charges, but says that it may consider depositions in the course of such hearing. Not only so, but it specifically provides in the last portion thereof that testimony for the use of said board may be taken by deposition 'under the same rules and practice as is now provided for the taking of depositions in civil cases.'

> "Under this statute, if there is an investigation pending before the State Board of Health, then testimony for the purpose of the hearing 'may be taken by deposition to be used in evidence,' in the same manner as depositions are taken to be used in evidence in civil cases."

The right and power to take and use depositions is fixed by statute. Ample authority is provided for taking depositions for use in causes pending in the courts, but their actual use in court is dependent upon certain conditions. No such conditions are specified by the statute with reference to their use by the State Board of Health. The statute says "the Board may receive and consider depositions." Therefore, the right to use the depositions is absolute and not conditional in matters pending before the Board. But the depositions must be *secured* in the same manner and under the same rules of practice as are provided for taking depositions in civil cases. Hence this point should be ruled against plaintiff in error.

VIII.

Plaintiff in error contends in one instance that the statute does not authorize or empower the Board to issue subpoenaes for witnesses and for the production of books, papers and documents to be used

in evidence (Tr. 3, 8, 54). And in another instance that the Board unlawfully refused, upon application therefor, to issue subpoenaes for witnesses and the production of documents to be used in the trial (Tr. 8, 54). These two positions are of course inconsistent. He argues that the Board has the power by implication to issue compulsory process. It has been held that "implication" is but another name for intention. Hence, if the Legislature had intended to authorize the State Board of Health of Missouri to issue compulsory process for witnesses and documents it undoubtedly would have said so. It not only failed to so state, but on the contrary expressly provided another method, namely, that of taking and using depositions. If the principle of implication can be applied to this statute it would operate directly contrary to the position of plaintiff in error. For when the statute directs the performance of certain things in a particular manner it forbids by implication every other manner of performance. However, this question has been settled by the Missouri Supreme Court in several decisions in which it has repeatedly held that the State Board of Health has no authority to issue compulsory process.

IX.

Objection is made by the plaintiff in error to the complaint filed in this case on the ground that it was signed by the Prosecuting Attorney of Jasper

County, Missouri; that as Prosecuting Attorney he had no authority whatever to make and file such complaint.

This contention has been repeatedly ruled against plaintiff in error by the Supreme Court of Missouri holding that anyone may make a complaint before the State Board of Health and the fact that it may be made by the Prosecuting Attorney is immaterial; that under the statute any citizen may make a complaint and that the use of the words "Prosecuting Attorney" following the signature may be treated as surplusage or as merely descriptive of the person; that one does not lose citizenship by reason of holding the office of Prosecuting Attorney. Hence, this point should be overruled.

CONCLUSION.

Defendants in error respectfully submit that Section 7336, R. S. of Mo., 1919, confers complete jurisdiction upon the State Board of Health of Missouri to receive, hear and determine complaints against physicians and surgeons for the violation of any of the grounds set out therein, and that if, upon hearing the proof, the Board finds that the charge has been sustained, it may revoke the license of the accused.

The method provided for securing and making of proof by depositions is not violative of the due process and equal protection clauses of the Four-

teenth Amendment of the Constitution of the United States. The accused has full and ample means of making a complete defense from the institution of the complaint to the highest court of the state, and this applies equally to every physician and surgeon. This is all the Fourteenth Amendment guarantees and all that can be insisted upon by the accused.

Therefore, the defendants in error earnestly insist that the decision of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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